(2)

96-1133

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

AIRMAN EDWARD G. SCHEFFER, RESPONDENT

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Military Rule of Evidence 707, which provides that evidence of a polygraph examination is not admissible in court-martial proceedings, is an unconstitutional abridgement of military defendants' right to present a defense.

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Pursuant to this Honorable Court's order of 10 March 1997, respondent hereby files this Brief in Opposition to petitioner's petition for a writ of certiorari. The respondent, Airman Edward G. Scheffer, respectfully prays that the writ of certiorari filed by the petitioner to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 18 September 1996, be denied.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at 44 MJ 442 (1996), is located at Appendix A. The opinion of the United States Air Force Court of Criminal Appeals, reported at 41 MJ 683 (AF Ct. Crim App 1995), is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on 18 September 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law."

The Sixth Amendment provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ."

STATEMENT OF THE CASE

Respondent, Airman Edward G. Scheffer, was tried on 14–17 October 1992, by general court-martial at March Air Force Base, California, for making and uttering checks with the intent to defraud under Article 123a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 923a; wrongfully using methamphetamine in violation of Article 112a, UCMJ, 10 U.S.C. § 912a; and failing to go to his appointed place of duty, in violation of Article 86, UCMJ, 10 U.S.C. § 886. He was sentenced to a bad conduct discharge, 30 months confinement, forfeiture of all pay and allowances, and reduction to the rank of Airman Basic. The convening authority approved the sentence as adjudged. On appeal to the Air Force Court of Criminal Appeals, the Court affirmed the findings and the sentence, ordering one day credit against his sentence for illegal pretrial confinement. App., *infra,* 48a. Respondent appealed to the Court of Appeals for the Armed Forces, which reversed and remanded. App., *infra,* 15a.

1. The only evidence admitted against respondent at his court-martial to prove his wrongful and knowing use of methamphetamine was the result of a random urinalysis test. (Pros. Exs. 1, 4). Respondent testified under oath in his own defense and denied knowingly ingesting methamphetamine. (R. 291). On cross-examination, his credibility was attacked.

On 10 April 1992, before respondent was requested to provide a urine sample, Air Force Office of Special Investigation (OSI) agents asked respondent to submit to a polygraph examination. Respondent agreed and took the exam the same day. The examination was administered by a government certified OSI polygrapher. The polygrapher asked respondent three questions: (1) Since you've been in the AF, have you ever used any illegal drugs?; (2) Have you lied about any of the drug information you've given OSI?; and (3) Besides your parents, have you told anyone you're assisting

OSI? Respondent answered "No" to each question. In the opinion of the polygrapher, based upon the polygraph examination he administered, respondent indicated no deception in answering the questions. (App. Ex. VII; R. 45).

2. At respondent's court-martial, defense counsel filed a motion requesting that "[t]he defense should be allowed to lay a foundation for the admission of the polygraph test in issue. The military judge should evaluate the adequacy of the foundation from the standpoint of relevance and helpfulness, and 'in these areas, judges should bend even further than normal in the direction of giving the accused the benefit of the doubt.'" (Citation omitted). (App. Ex. VII). The military judge, without hearing any testimony from the OSI polygrapher or any other evidence on the motion, denied respondent the opportunity to lay a foundation under Mil.R.Evid. 702.[1] The judge, without hearing any evidence involving the non-exhaustive principles set forth by this Honorable Court in *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993), ruled that "the President may, through the Rules of Evidence, determine that credibility is not an area in which a fact finder needs help, and the polygraph is not a process that has sufficient scientific acceptability to be relevant." (R. 46). He further ruled that, under Mil.R.Evid. 403[2], "the fact finder might give it too much weight, and that there is an inordinate amount of time and expense, especially in cases where there may be conflicting tests, which doesn't appear to be the case here. The main confusion of the issue;

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[1]Which is the same as Federal Rule of Evidence 702.

[2]Which holds: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The rule is the same as Federal Rule of Evidence 403.

that is, the question of what the result of the polygraph was, as opposed to the question of whether or not the accused used drugs." (R. 46).

3. On appeal, respondent contended that the military judge had made two separate errors in ruling that the polygraph evidence was inadmissible in his case. First, he abused his discretion when he ruled that, due to the potential for confusion of conflicting tests (of which there were none in respondent's case) there would be an undue risk of confusion to the court-members.[3] Second, he erred when he applied Mil.R.Evid. 707, a rule of evidence which respondent submits is unconstitutional because it denied him the opportunity to lay a foundation for the admission of scientific evidence and to present relevant and favorable evidence in his defense, in violation of the Fifth and Sixth Amendments to the United States Constitution.

The Court of Appeals for the Armed Forces agreed that Mil.R.Evid 707 was unconstitutional, however, only to the extent it denies an accused the opportunity to admit exculpatory scientific evidence under Mil.R.Evid. 702 and this Court's decision in *Daubert, surpa:* "We do not now hold that polygraph examinations are scientifically valid or that they will always assist the trier of fact, in this or any other individual case. We merely remove the obstacle of the *per se* rule against admissibility," quoting from *United States v. Posado,* 57 F.3d 428 (5th Cir. 1995). App., *infra,* 10a. The Court did not otherwise hold Mil.R.Evid. 707 unconstitutional, but left that question for another day.

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[3]Respondent refers in this Brief to "court-members" and "accused, " when applicable, since those are the terms used in the military for the functional equivalent of a civilian "jury" and "defendant," respectively.

REASON FOR DENYING THE WRIT

The Court of the Appeals for the Armed Forces' narrowly tailored holding which "merely remov[ed] the obstacle of the *per se* rule [of Military Rule of Evidence 707] against admissibility" of exculpatory polygraph evidence offered by a military accused was proper. Military Rule of Evidence 707 infringes upon an accused's Sixth Amendment right to present a defense. The rule is a *per se* rule of exclusion which fails to take into account the particular facts and circumstances of an individual case. The rule does not allow an accused to attempt to lay a foundation for admission of scientific evidence that may otherwise be admissible. Further, most Federal Courts admit polygraph evidence to one degree or another, and do not have a *per se* rule of inadmissibility.

The reasons set forth in Mil.R.Evid. 707 for blanket exclusion of polygraph evidence are arbitrary and unreasonable. It cannot be determined in a vacuum that polygraph evidence, in all cases, under all circumstances, is confusing, a waste of time, and unreliable. Scientific evidence does not usurp the court-members' role, rather it may assist them in performing that role.

Finally, consideration of the uniqueness of military society does not warrant a *per se* exclusion of all polygraph evidence. Military courts routinely consider technical and scientific evidence, often far more complex than polygraph evidence, and consider expert testimony on a myriad of other issues. The carefully crafted holding in this case was rendered by the Court of Appeals for the Armed Forces, which is uniquely qualified to balance the specialized needs of military society with the fundamental right of a military accused to present his or her defense.

1. The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be

. . .deprived of life, liberty, or property, without due process of law." The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts." *Washington v. Texas,* 388 U.S. 14, 19 (1967); *Rock v. Arkansas,* 483 U.S. 44, 52 (1987).

The combined effect of the Amendments is a "require[ment] that criminal defendants be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta,* 467 U.S. 479, 485 (1984). An accused must be afforded a fundamentally fair trial in which he is afforded "an opportunity to be heard in his defense—a right to his day in court." *In Re Oliver,* 333 U.S. 257, 273 (1948).

This Court has often declared that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Taylor v. Illinois,* 484 U.S. 400, 408 (1988); *Chambers v. Mississippi,* 410 U.S. 284, 302 (1973). Moreover, in protection of this fundamental right, this Court has consistently reversed convictions where an accused was denied the opportunity to present relevant, probative evidence in his defense based on the mechanistic applications of *per se* exclusionary rules. The Supreme Court declared long ago that "[t]he Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he has no right to use." *Washington v. Texas,* 388 U.S. at 23 (Sixth Amendment violated by arbitrary denial of accomplice testimony in favor of the defense). An accused's right to present testimony that is relevant and material may not be denied arbitrarily. *Id.*

The issue in this case is whether the government can rely on a *per se* rule of evidence that denies an accused the opportunity to show that he has exculpatory scientific evidence and to present that favorable evidence if the proper evidentiary foundation is established. This Court has said "No" in similar cases.

In *Rock v. Arkansas,* 483 U.S. 44 (1987), the Court reversed a state court opinion that relied on a *per se* exclusionary rule without regard to the rights of the defendant. The defendant was charged with manslaughter based on the shooting death of her husband. Because the defendant could not remember the precise details of the shooting, her attorney suggested that she submit to hypnosis in order to refresh her memory. She was hypnotized twice but did not relate any new information during either of the sessions. After the hypnosis, however, she remembered details of the shooting that were corroborated by other evidence in the case.

At the time of the defendant's trial, Arkansas had a *per se* rule of evidence that did not allow the trial court to consider whether posthypnosis testimony could be admissible in a particular case. Acting on the government's pretrial motion, the trial court issued an order limiting petitioner's testimony to matters remembered and stated to the examiner prior to hypnosis.

In reviewing the scientific validity of hypnosis, the Supreme Court noted that "there is no generally accepted theory to explain the phenomenon, or even a consensus on a single definition of hypnosis. The use of hypnosis in criminal investigations, however, is controversial, and the current medical and legal view of its appropriate role is unsettled." *Rock,* 483 U.S. at 59 (citation and footnote omitted). Moreover, the Court stated that "[w]e are not now prepared to endorse without qualifications the use of hypnosis as an

investigative tool; scientific understanding of the phenomenon and of the means to control the effects of hypnosis is still in its infancy." *Rock,* 483 U.S. at 61. Nonetheless, the Court declared:

> Arkansas, however, has not justified the exclusion of *all* of a defendant's testimony that the defendant is unable to prove to be the product of prehypnosis memory. A State's legitimate interest in barring *unreliable evidence does not extend to per se exclusions* that may be reliable in an individual case. *Wholesale inadmissibility* of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of *all* posthypnosis recollections.

Rock, 483 U.S. at 61. (Emphasis added). *See also Davis v. Alaska,* 415 U.S. 308 (1974)(petitioner's right of confrontation is paramount to a State's rule prohibiting cross-examination of government witness concerning the witness' probationary status as a juvenile delinquent).

In *Chambers v. Mississippi, supra,* this Court held that evidentiary rules "may not be applied mechaniclistically to defeat the ends of justice." 410 U.S. at 302. In *Chambers,* the defendant was convicted of murdering a policeman. After his arrest, but prior to trial, another man, McDonald, on three separate occasions, confessed to the murder in a sworn written statement and in unsworn oral statements to others. McDonald was called as a defense witness, but repudiated his prior statements. The defendant was unable to cross-examine him because of a state rule preventing a party from impeaching its own witness. McDonald's oral confessions to others were excluded from evidence as inadmissible hearsay. This Court held that although the defendant was able to "chip . . . away at the fringes" of McDonald's story by the

admission of other evidence, his defense was "far less persuasive than it might have been had he been given an opportunity" to present a complete defense. *Id.* at 294. Without deciding the validity of the state "voucher" rule and while plainly recognizing the validity and widespread acceptance of the hearsay rule, the Court held that the combination of the two evidentiary rules as applied in *Chambers* denied the defendant his right to a fundamentally fair trial. *Id.* at 303. *See also Crane v. Kentucky,* 476 U.S. 683 (1986) (exclusion of testimony about the circumstances of a confession deprived the defendant of his right to present a defense).

2. Although *Rock* involved an accused's own testimony, *Washington* and *Chambers* did not. The lesson of cases such as *Chambers, Washington,* and *Rock* is clear: when an accused's ability to present a defense is implicated, there must be a compelling governmental interest to overcome an accused's constitutional rights. The Supreme Court provided a framework for addressing this issue in *Rock, supra*:

> . . .restrictions of a defendant's rights to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitations imposed on the defendant's constitutional right to testify.

Rock 483 U.S. at 55–56.

Applying *Chambers, Rock,* and *Washington* to Mil.R.Evid. 707, one must look to the rationale provided by the drafters of the rule and ask, do the interests served justify the limitations imposed on an accused? The Drafter's Analysis to Mil.R.Evid. 707 (the rule was adopted in 1991) sets forth four reasons for the *per se* exclusion of polygraph evidence:

> (1) fear that court members would be misled, (2) concern that a confusion of issues would arise, (3) the possibility that the trial would incur a substantial waste of time, and (4) that the polygraph is inherently unreliable.

United States v. Williams, 39 MJ 555, 558 (ACMR 1993), *vacated,* 43 MJ 348 (1995).

The first three reasons given in the drafters' analysis deal with the belief that court-members will be confused or misled by polygraph evidence. However, numerous scientific studies have shown that civilian juries are not unduly influenced or confused by polygraph evidence. *See United States v. Piccinonna,* 885 F.2d 1529 (11th Cir. 1989). Given the qualifications of military court-members, it is unlikely they would be either.[4] Further, in the drafter's analysis to Mil.R.Evid. 704, the drafters note that they are confident "[t]he statutory qualifications for military court-members reduce the risk that military court members will be *unduly influenced* by the presentation of ultimate opinion testimony from psychiatric experts." (Emphasis added). Manual For Courts-Martial (MCM), United States, 1984, App. 22, pg. A22–46. The reasoning used to justify Rule 707 is

[4]Under Article 25(d)(2), UCMJ, states in pertinent part: "When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." Generally, court-martial panels are comprised of military officers, although enlisted personnel may serve at the accused's request. All officers detailed to courts-martial have at least a bachelors degree, and many have graduate degrees. Almost without exception, enlisted personnel detailed to a panel have a high school degree and have served in their branch of service for many years.

inconsistent with these studies and the justification for not adopting Rule 704(b).

In *Williams,* the Army Court of Military Review looked at the reasons for exclusion of polygraph evidence articulated by the drafters and found them wanting. They correctly noted that the first three concerns were routinely resolved by trial judges under Mil.R.Evid. 403. Moreover, the Army court declared that the "fourth reason is, in its worst light, disingenuous, and at best incongruous with the substantial investment the Department of Defense has made, and continues to make, in polygraph examinations. . . ." *Williams,* 39 M.J. at 558. Further, as the Court of Military Appeals has noted, "[t]he greater weight of authority indicates it can be a helpful scientific tool." *United States v. Gipson,* 24 MJ 246 (CMA 1987).

Likewise the belief that polygraph evidence is inherenty unreliable is misplaced and arbitrary. Mil.R.Evid. 707 completely ignores the facts and circumstances of a particular case and denies an accused the opportunity to lay a foundation for an entire category of scientific evidence. It presumes that for all time and in all fact situations, the scientific understanding and support of polygraph evidence will remain the same. It does not allow lawyers to build support for the scientific validity of a category of scientific evidence. Fifteen years ago, DNA evidence in a criminal trial was new and untested. It was the subject of controversy in both the legal and scientific fields. *See United States v. Two Bulls,* 918 F.2d 56, 58 (8th Cir. 1990). At that time, many of the same arguments that were made against the use of DNA evidence are being used today to arbitrarily prevent a defendant from laying a foundation for scientific evidence under *Daubert* and Mil.R.Evid. 702. However, today DNA evidence is generally accepted throughout the United States.

Given that no evidence was presented in respondent's case about the polygraph he took, the Department of Defense's heavy reliance on polygraphs, the fact that the polygrapher in respondent's case was a certified government polygrapher, and given the significant advances in the field of polygraphs, (*See Piccinona, supra*), it is completely arbitrary to conclude that respondent's polygraph, or any polygraph in a particular case, is inherently unreliable. The perceived unreliability or controversy of particular scientific evidence is not the controlling issue in determining its admissibility. *Rock, supra; See also Daubert, supra.* The reasons advanced for the creation of Mil.R.Evid. 707 are arbitrary and unreasonable.

3. Petitioner argues that a defendant does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence, citing *Taylor v. Illinois, supra*.[5] Petition, at 14. The polygraph evidence in respondent's case, however, was not privileged, there were no facts to show that his polygraph was incompetent, and Mil.R.Evid. 707 is not a "standard" rule of evidence. Moreover, the holding of this Court in the *Rock* case is applicable to scientific polygraph evidence. Like hypnotically induced testimony, it argued that the scientific understanding of polygraph evidence is "controversial" and the current "legal view of its appropriate role is unsettled." Nevertheless, this does not justify exclusion of all polygraph evidence and denial of an accused's right to lay a foundation for the admissibility of polygraph evidence. A State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case. *Rock, supra.* Mil.R.Evid. 707 unreasonably presumes that all polygraph evidence, no matter the

[5]Most of the Federal Circuits do not have *per se* rules holding polygraph evidence inadmissible in all cases. *United States v. Piccinnona,* 885 F.2d 1529 (11th Cir. 1989).

circumstances under which it is taken, no matter the facts of a particular case, no matter the scientific advances in the art of polygraph evidence, and no matter the purpose for the polygraph evidence, will always and forever be unreliable, confusing, and a substantial waste of time. But, "critics of polygraph evidence seem to forget that no evidence can be said to be one hundred percent accurate." John J. Canham, Jr., *Military Rule of Evidence 707. A Bright Line Rule That Needs to be Dimmed,* 140 Mil L. Rev. 65 (1993). It is the utter arbitrariness of the rule that makes it unconstitutional.[6]

4. Petitioner argues that Mil.R.Evid. 707 "need only recognize, as the President did in promulgating Rule 707, that the technique's lack of broad acceptance will result in time-consuming collateral litigation designed to ensure the factfinder is not confused or unduly swayed. . . " Petition, at 16. On the contrary, polygraph evidence does not lack "broad acceptance."

As the Army Court of Criminal Appeals noted in *Williams, supra,* the Department of Defense relies heavily on the use of polygraphs. Further, every Federal Circuit save two allows the admission of polygraph evidence. *Piccinonna, supra* (noting that, at that time, only the Fourth, Fifth, and DC Circuits had a *per se* rule against admissibility). In 1991, the

[6]It cannot be overemphasized that Mil.R.Evid 707 bars polygraph evidence in all situations, even if an accused attempts to admit a polygraph test as mitigation evidence during the sentencing phase of her death penalty case. In a footnote in *Lankford v. Idaho,* 500 U.S. 110 (1991), this Court noted, in regard to the admission of polygraph evidence as mitigation during sentencing in a death penalty case, that "a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable." Mil.R.Evid. 707 would exclude polygraph evidence by a military accused in such a case.

Fourth Circuit noted the serious constitutional concerns involving a *per se* rule of inadmissibility of polygraph evidence. *See United States v. A & S Council Oil Co.*, 947 F.2d 1128, 1134 n.4 (4th Cir. 1991). Further the DC Circuit rule of inadmissibility is based upon decisions from the 1970's, prior to the creation of Fed.R.Evid. 702 and this Court's ruling in *Daubert, supra. See United States v. Skeens,* 494 F.2d 1050 (DC Cir. 1973). Since *Piccinonna,* the Fifth Circuit has abandoned its *per se* rule of inadmissibility. *United States v. Pettigrew, et al.,* 77 F.3d 1500 (5th Cir. 1996), *citing Posado, supra.* Finally, the Ninth Circuit does not have a *per se* rule of exclusion. *United States v. Miller,* 874 F.2d 1255, 1262 (9th Cir. 1989), *cert denied,* 510 U.S. 894; *United States v. Bowen,* 857 F.2d 1337, 1341 (9th Cir. 1988); *United States v. Crumby,* 895 F.Supp. 1354 (D. Ariz. 1995) ("Stipulated polygraph evidence has been in use in the Ninth Circuit for a number of years and its use is prevalent in most circuits"). The *Crumby* court did away with the bar to unstipulated polygraph evidence.

Article 36 of the Uniform Code of Military Justice, 10 U.S.C. § 838, does allow the President "so far as he considers practicable, [to] apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts." A *per se* rule of inadmissibility regarding polygraph evidence, however, is not one of those "generally recognized" rules of evidence. At least with the federal government and federal courts, polygraph evidence does not lack broad acceptance. The military justice system stands essentially alone in the Federal system in not allowing an accused the opportunity to lay a foundation for polygraph evidence.

5. Petitioner argues that polygraph evidence usurps a

jury's role in determining credibility. Petition, at 15. It does not. The polygrapher in respondent's case was simply going to testify that respondent's answers to relevant questions indicated "no deception," not that, in the expert's opinion, the respondent was telling the truth or didn't use drugs.

One rationale for the policy against not allowing witnesses to testify that they believe a victim or an accused is telling the truth is a concern that "the members of the court may be misled into believing that the character witness has himself made inquiry into the merits of the case, and has reached his own admissible conclusion." *United States v. Adkins,* 5 USCMA 492, 18 CMR 116 (1955). Clearly, this would not be a concern with the polygrapher's testimony. The court-members would know what tests the polygrapher has done and why he is testifying. Further, proper limiting instructions could by given by the judge. If anything, the results of a polygraph, measuring bodily responses and reactions of a witness to relevant questions, provide court-members with relevant information about a witness to help *them determine* credibility.[7] It does not determine the truthfulness of the allegations.

6. Finally, petitioner argues that the Court of Appeals' opinion "does not reflect consideration" that the military is a specialized society separate from civilian society, and that the costs of allowing a defendant the opportunity to lay the foundation for polygraph evidence "are particularly unwarranted and onerous in the military context." Petition, at

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[7]Bias, prejudice, character for truthfulness, prior convictions, the fact that a witness is testifying under a grant of immunity, prior inconsistent statements, prior consistent statements, being paid to testify (expert witnesses), are just some of the further types of evidence placed before a jury to help them in determining the credibility of the witnesses' testimony. The rules allow all of this evidence, in a proper case, to go before the jury.

16. This argument fails to recognize the unique role of the Court of Appeals for the Armed Forces in the military justice system, the reasons articulated by the President for the promulgation of Mil.R.Evid. 707, and the nature of the case launched by the prosecution against respondent at his court-martial.

The Court of Appeals for the Armed Forces was specifically created to safeguard the rights of servicemembers. In creating the UCMJ and the present appellate structure in 1950, it was Congress' belief that oversight of the military justice system would be strengthened. As Congressman Philbin from Massachusetts noted about the Court of Military Appeals during the Congressional Floor Debate on the UCMJ:

> [I]t is entirely disconnected with the Department of Defense or any other military branch, completely removed from any outside influences. It can operate, therefore, as I think every Member of Congress intends it should, as a great, effective, impartial body sitting at the top-most rank of the structure of military justice and insuring as near as it can be insured by any human agency, absolutely fair and unbiased consideration for every accused. Thus, for the first time this Congress will establish, if this provision is written into law, a break in command control over court-martial cases and civilian review of the judicial proceedings and decisions of the military.

Cong. Floor Debate on UCMJ, U.S. House of Representatives, Cong. Record, Vol 95, Pt 5, p.5718 (1949).

If any court in the United States is uniquely qualified to consider the specialized and unique structure of the Armed Forces, it is the Court of Appeals for the Armed Forces, which has been doing exactly that for 46 years. In the past, this

Honorable Court has cited to the Court of Appeals for the Armed Forces when discussing the deference civilian courts must give to the "specialized society" that is the military. *Parker v. Levy*, 417 U.S. 733, 753 (1974). In this case, this Honorable Court should give great deference to the Court of Appeals consideration of the factors petitioner discusses, when it determined that, under the military criminal justice system, the reasons set forth for the creation of Mil.R.Evid. 707 do not warrant a radical departure from the practice of the vast majority of Federal Courts.

Petitioner's concern about military society also does not take into account that the Air Force, in deciding to prosecute servicemembers when their urinalysis samples tests positive for illegal drugs, has created a very complex and expensive litigation network. The military is the only jurisdiction, known to respondent, that prosecutes people based merely on the results of a urinalysis test. In all cases involving a urinalysis, the prosecution is required to call an expert witness to explain the scientific test result to the factfinder and lay the proper foundation for its admission. *United States v. Hunt*, 33 MJ 345 (CMA 1991). The accused is also normally provided a defense expert witness.

In respondent's case, the prosecution proved that respondent had knowingly used methamphetamine by offering into evidence the results of a machine, which measured metabolites of a drug respondent had in his system. To interpret this scientific evidence and establish a proper foundation and chain of custody, the prosecution was not required to call any of the laboratory personnel who conducted the test of respondent's urine, but offered an "expert witness" to explain to the factfinder what the results of the machine that tested respondent's urine revealed. From this evidence, and no other, the factfinder was allowed to infer that respondent knowingly used an illegal drug. In his

defense, respondent could not cross exam the machine or laboratory personnel that tested his urine sample. He did, however, wish to lay a foundation to offer into evidence the results of a machine that measured, much like the machine used to test his urine, reactions of his body that the factfinders could not observe. These results were relevant in determining respondent's credibility. To interpret the results of this scientific evidence, respondent too wanted to call an expert witness to explain his conclusions as to what a machine measured. In his case, though, the prosecution cried foul and on appeal the United States says he cannot do so. Petitioner's argument is an argument the Constitution will not allow.

The concern noted by this Honorable Court over 20 years ago in *Middendorf v. Henry,* 425 U.S. 25, 45–46 (1976), that "[t]he introduction of procedural complexities into military trials is a particular burden to the Armed Forces because virtually all the participants,[8] including the defendant and his counsel, are members of the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline" is not an overriding concern today. The Air Force now routinely goes to great lengths to prosecute complex urinalysis cases. Similarly, the Air Force has welcomed with open arms the use of DNA evidence in court-martials, with all of its "procedural complexities." *United States v. Thomas,* 43 MJ 626 (AF Ct. Crim App. 1995). Military courts cannot be expected to allow

[8]With respect to Air Force counsel, at least, this concern is unwarranted. Their military duty is to spend their time in matters involving imposition of military discipline. Officers are assigned as circuit defense counsel and circuit trial counsels whose primary mission is to try court-martials in various "circuits" throughout the world. Any other tangential duties they may have are generally related to this primary duty.

"procedural complexities" at a court-martial to perfect the government's case, but not allow them in order to permit an accused to present a viable defense.

Finally, none of the reasons set forth by the drafters in the Analysis to Mil.R.Evid. 707 are addressed to any concern about the uniqueness of military society. MCM, United States, 1984, App. 22, pg. A22–46. This lack of concern is evident when the Analysis to Mil.R.Evid. 702 is considered.

Mil.R.Evid 702 was adopted before Mil.R.Evid. 707. In adopting Mil.R.Evid. 702, the President did away with what was then a *per se* policy against the admission of polygraph evidence: "Para. 142*e* of the 1969 Manual, 'Polygraph tests and drug-induced or hypnosis-induced interviews,' has (sic) been deleted as a result of the adoption of Rule 702." Paragraph 142*e* of the 1969 Manual had stated that "The conclusions based upon or graphically represented by a polygraph test and conclusions based upon, and the statements of the person interviewed made during a drug-induced or hypnosis-induced interview are inadmissible in evidence." The Analysis further noted (of Mil.R.Evid. 702),

> Clearly, such evidence must be approached with great care. Considerations surrounding the nature of such evidence, any possible prejudicial effect on a fact finder, and the degree of acceptance of such evidence in the Article III courts are factors to consider in determining whether it can in fact "assist the trier of fact."

MCM, United States, App. 22, pg. A22–45. In respondent's case, the Court of Appeals did exactly what the President believed, in adopting Mil.R.Evid. 702, would be done when considering the admissibility of polygraph evidence.

Conclusion

The fundamental problem with Mil.R.Evid. 707 is its denying an accused the opportunity to lay a foundation for admissibility of scientific evidence that may be legally and logically relevant. The rule freezes the law and progress of a category of scientific evidence, *circa* 1991. As the Court of Military Appeals (now the Court of Appeals for the Armed Forces), noted in *Gipson, supra.*:

> In our assessment, the state of the polygraph technique is such that, depending on the competence of the examiner, the suitability of the examinee, the nature of the particular testing process employed, and such other factors as may arise, the results of a particular examination may be as good as or better than a good deal of expert and lay evidence that is routinely and uncritically received in criminal trials. Further, it is not clear that such evidence invariably will be so collateral, confusing, time-consuming, prejudicial, etc., as to require exclusion . . . Rather, until the balance of opinion shifts decisively in one direction or the other, the latest developments in support of or in opposition to particular evidence should be marshaled at the trial level.

Gipson, 24 MJ at 253.

Mil.R.Evid. 102 states that the rules of evidence shall be construed to promote the growth and development of the law of evidence. Mil.R.Evid. 707 stunts that growth. "Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice." *Hawkins v. United States,* 358 U.S. 74, 81 (1958) (Stewart, J. concurring).

WHEREFORE, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 1997

APPENDIX A

UNITED STATES, Appellee

v.

Edward G. SCHEFFER, Airman
U.S. Air Force, Appellant

No. 95–0521

Crim. App. No. 30304

United States Court of Appeals for the Armed Forces

Argued May 8,1996

Decided Sep. 18, 1996

Counsel

For Appellant: *Captain Michael L. McIntyre* (argued); *Colonel Jay L. Cohen* and *Captain Del Grissom* (on brief); *Lieutenant Colonel Joseph L Heimann.*

For Appellee: *Major Jane M.E. Peterson* (argued); *Colonel Teffery T. Infelise* (on brief).

Military Judge: H. Martin Jayne

Opinion of the Court

GIERKE, Judge:

A general court-martial composed of officer members at March Air Force Base, California, convicted appellant, contrary to his pleas, of uttering bad checks, wrongfully using methamphetamine, failing to go to his appointed place of duty, and absenting himself from his unit (13 days), in violation of Articles 123a, 112a, and 86, Uniform Code of

Military Justice, 10 USC §§ 923a, 912a, and 886, respectively. The adjudged and approved sentence provides for a bad-conduct discharge, confinement for 30 months, total forfeitures, and reduction to the lowest enlisted grade. The Court of Criminal Appeals affirmed the findings and sentence but awarded one day of credit against his sentence to forfeitures (confinement had expired) for lack of timely pretrial confinement review, relying on *County of Riverside v. McLaughlin,* 500 U.S. 44 (1991); *United States v. Rexroat,* 38 MJ 292 (CMA 1993). *See* 41 MJ 683, 693 (1995).

We granted review of the following issue:

> WHETHER THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S MOTION TO PRESENT EVIDENCE OF A FAVORABLE POLYGRAPH RESULT CONCERNING HIS DENIAL OF USE OF DRUGS WHILE IN THE AIR FORCE.

In March of 1992, appellant began working as an informant for the Air Force Office of Special Investigations (OSI). During late March and early April, appellant told OSI that two civilians, Davis and Fink, were dealing in significant quantities of drugs. On April 7, 1992, at the request of OSI, appellant voluntarily provided a urine sample. Periodic urinalyses are normal procedure for controlled informants.

On April 10, OSI asked appellant to submit to a polygraph examination. The OSI polygraph examiner asked appellant three questions: (1) Had he ever used drugs while in the Air Force; (2) Had he ever lied in any of the drug information he gave to OSI; and (3) Had he told anyone other than his parents that he was assisting OSI? Appellant answered "No" to each question. The polygraph examiner concluded that "no deception" was indicated.

Appellant's urinalysis tested positive for

methamphetamine. The report was dated May 20, although local OSI agents may have learned of the results as early as May 14.

At trial appellant asked the military judge for an opportunity to lay a foundation for the favorable polygraph evidence. The military judge denied the request without receiving any evidence, ruling that "the President may, through the Rules of Evidence, determine that credibility is not an area in which a factfinder needs help, and the polygraph is not a process that has sufficient scientific acceptability to be relevant." He further ruled that under Mil.R.Evid. 403, Manual for Courts-Martial, United States (1995 ed.),

> [t]he factfinder might give it too much weight, and that there is an inordinate amount of time and expense, especially in the cases where there may be conflicting tests, which doesn't appear to be the case here. The main confusion of the issue; that is, the question of what the result of the polygraph was, as opposed to the question of whether or not the accused used drugs.

During the trial on the merits, appellant testified that he visited Davis on April 6, left Davis' house around midnight, and began driving toward March Air Force Base. The next thing he remembered was waking up the next morning in his car in a remote area, not knowing how he got there. He denied "knowingly" ingesting drugs at any time between March 5, when he began working for OSI, and April 7, the date he provided the urine sample that tested positive for methamphetamine.

Trial counsel cross-examined appellant about inconsistencies between his trial testimony and earlier statements to the OSI, and his lack of a "sudden rush of

energy" and other symptoms of ingesting methamphetamine. Trial counsel's closing argument urged the court members to look at appellant's credibility. Trial counsel argued, "He lies. He is a liar. He lies at every opportunity he gets and he has no credibility. Don't believe him. He knowingly used methamphetamine, and he is guilty of Charge II."

Appellant asserts that Mil.R.Evid. 707 violates his Sixth Amendment right to present a defense because it compelled the military judge to exclude relevant, material, and favorable evidence offered by appellant. He argues that he was constitutionally entitled to be given an opportunity to rebut the attack on his credibility as a witness by laying a foundation for favorable polygraph evidence. The Government asserts that the Rule does not impermissibly infringe on the Sixth Amendment. It argues that Mil.R.Evid. 707 merely codifies all the evidentiary prohibitions against polygraph evidence and that, even without Mil.R.Evid. 707, polygraph evidence would never be admissible. We agree with appellant.

In *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923), polygraph evidence was held to be inadmissible because it was unreliable. In *United States v. Gipson* 24 MJ 246, 253 (1987), our Court held that an accused is "entitled to attempt to lay" the foundation for admission of favorable polygraph evidence. In arriving at that holding, our Court acknowledged that Mil.R.Evid. 702 "may be broader and may supersede *Frye v. United States,*" *supra.* 24 MJ at 251. The impact of our *Gipson* decision was short-lived, however, because on June 27, 1991, the President promulgated Mil.R.Evid. 707 in Executive Order No.12767, § 2, 56 Fed. Reg. 30296.

Mil.R.Evid. 707 provides: "Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination,

shall not be admitted into evidence." Unlike most military rules of evidence, Mil.R.Evid. 707 has no counterpart in the Federal Rules of Evidence. It is similar to Cal.Evid. Code 351.1 (West 1988 Supp.). *See People v. Kegler,* 197 Cal. App. 3d 72, 84, 242 Cal. App. 897, 905 (1987). Mil.R.Evid. 707 "is not intended to accept or reject *United States v. Gipson*, 24 MJ 246 (CMA 1987), concerning the standard for admissibility of other scientific evidence under Mil.R.Evid. 702 or the continued vitality of *Frye v. United States,* 293 F.1013 (D.C. Cir.1923)." Drafters' Analysis of Mil.R.Evid. 707, Manual, *supra* (1995 ea.) at A22–8.

Presidential authority to promulgate rules of evidence is founded on Article 36(a), UCMJ,10 USC 836(a). That Article provides that such rules "shall, so far as [The President] considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter."

Appellant's case presents two questions. The first is a statutory question: did the President comply with Article 36 when he promulgated Mil.R.Evid. 707. The second is a constitutional question: does Mil.R.Evid. 707 violate the Sixth Amendment. We review these questions of law *de novo. United States v. Ayala,* 43 MJ 296, 298 (1995).

The statutory question was neither briefed nor argued. It may well be that the *per se* prohibition in Mil.R.Evid. 707 is "at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony."' *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 588, 113 S.Ct. 2786, 2794 (1993). We note that the majority of the federal circuits do not have a per se prohibition against polygraph evidence. Instead, they rely on the trial judge to apply a *Daubert* analysis and apply Fed. R. Evid. 401–03. *United States v.*

Pulido, 69 F.3d 192, 205 (7th Cir. 1995) (no *per se* rule against admissibility of polygraph evidence); *see United States v. Posado,* 57 F.3d 428, 436 (5th Cir. 1995) (reversing *per se* exclusion of polygraph evidence); *United States v. Piccinonna,* 885 F.2d 1529, 1535 (11th Cir., 1989) (holding that polygraph evidence not inadmissible *per se*); *Anderson v. United States,* 788 F.2d 517, 519 n. 1 (8th Cir. 1986) (polygraph evidence admissible by stipulation); *see also United States v. A & S Council Oil Co.,* 947 F.2d 1128, 1134 n. 4 (4th Cir. 1991) (holding that polygraph evidence not admissible in 4th Circuit but recognizing that "[c]ircuits that have not yet permitted evidence of polygraph results for any purpose are now the decided minority"). *But see United States v. Scarborough,* 43 F.3d 1021, 1026 (6th Cir. 1994) (polygraph results "inherently unreliable"); *United States v. A & S Council Oil Co., supra* (polygraph evidence not admissible); *United States v. Soundingsides,* 820 F.2d 1232, 1241 (10th Cir. 1987) (polygraph evidence "not admissible to show" that witness "is truthful"); *United States v. Skeens,* 494 F.2d 1050, 1053 (D.C. Cir. 1974) (adhering to Frye and holding polygraph evidence inadmissible); *Dowd v. Calabrese,* 585 F.Supp. 430 (D. D.C. 1984) (polygraph results not sufficiently reliable to be admissible).

The Federal rules are virtually identical to Mil.R.Evid. 401–03. Whether the President determined that prevailing federal practice is not "practicable" for courts-martial cannot be determined from the record before us. Assuming without deciding that the President acted in accordance with Article 36 and determined that the prevailing federal rule is not "practicable" for courts-martial, we turn to the constitutional question.

Our Court entertained a direct attack on the constitutionality of Mil.R.Evid. 707 in *United States v. Williams,* 43 MJ 348 (1995). We held, however, "that the

accused had no right to introduce the polygraph evidence without taking the stand and testifying consistently, or without offering some other plausible evidentiary basis." 43 MJ at 355. *See also United States v. Abevta,* 25 MJ 97, 98 (CMA 1987) (polygraph evidence not relevant unless accused testifies). In *Williams* we observed: "Thus, in the appropriate case, the question will be whether the proffered polygraph evidence is sufficiently reliable and necessary that its automatic exclusion violates the accused's constitutional trial rights." 43 MJ at 353.

Unlike Williams, this appellant testified, placed his credibility in issue, and was accused by the prosecution of being a liar. Thus the constitutional issue is squarely presented. We hold that Mil.R.Evid. 707, as applied to this case, is unconstitutional. A *per se* exclusion of polygraph evidence, offered by an accused to rebut an attack on his credibility, without giving him an opportunity to lay a foundation under Mil.R.Evid. 702 and *Daubert,* violates his Sixth Amendment right to present a defense. We limit our holding to exculpatory evidence arising from a polygraph examination of an accused, offered to rebut an attack on his credibility. We leave for another day other constitutional questions such as those involving government-offered polygraph evidence or evidence of a polygraph examination of a witness other than an accused.

The Sixth Amendment grants an accused "the right to call 'witnesses in his favor.'" *Rock v. Arkansas,* 483 U.S. 44, 52 (1987). An accused's right to present testimony that is relevant and material may not be denied arbitrarily. *Washington v. Texas,* 388 U.S. 14, 23 (1967); *see United States v. Woolheater,* 40 MJ 170, 173 (CMA 1994).

The right to present evidence, however, is not unlimited, but "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v.*

Mississippi, 410 U.S. 284, 295 (1973). *See, e.g., Washington v. Texas,* 388 U.S. at 23 n. 21 (right to present testimony may be limited by testimonial privilege or rules relating to mental ability to testify). When restrictions are placed on an accused's right to present evidence, they "may not be arbitrary or disproportionate to the purposes they are designed to serve." *Rock v. Arkansas,* 483 U.S. at 56. Applying the foregoing principles, the Supreme Court held in *Rock* that a *per se* rule excluding the defendant's hypnotically refreshed testimony infringed his right to present a defense. The Supreme Court held that a "legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case." 483 U.S. at 61. While *Rock* concerned exclusion of a defendant's testimony and this case concerns exclusion of evidence supporting the truthfulness of a defendant's testimony, we perceive no significant constitutional difference between the two. In either case, the Sixth Amendment right to present a defense is implicated.

Mil.R.Evid. 702 permits expert testimony when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Expert testimony is subject to the relevance requirements of Mil.R.Evid. 401 and 402 and the balancing requirements of Mil.R.Evid. 403. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. at 597, 113 S.Ct. at 2798, the Supreme Court made the trial judge a gatekeeper, trusted with responsibility to decide if novel scientific evidence was sufficiently relevant and reliable to warrant admission.

An expert witness may not testify that a declarant was telling the truth, but may testify to the absence of indicia of deception. Thus, in *United States v. Cacy,* 43 MJ 214, 218 (1995), we held that it was not error to permit an expert to

testify that a victim's accusation did not appear to be feigned or rehearsed. Similarly, in *United States v. Suarez,* 35 MJ 374, 376 (CMA 1992), we held that it was not error for an expert to opine that counter-intuitive conduct, such as recanting an accusation, inconsistent statements, or failing to report abuse is not necessarily inconsistent with a truthful accusation. *See also United States v. Houser,* 36 MJ 392, 398–00 (CMA 1993). Finally, we have permitted experts to opine whether a complainant "can differentiate between fantasy and fact." *United States v. Palmer,* 33 MJ 7, 12 (CMA 1991); *United States v. Tolppa,* 25 MJ 352, 354–55 (CMA 1987), *citing United States v. Azure,* 801 F.2d 336, 340 (8th Cir. 1986). Under the same rationale as these cases, a properly qualified expert, relying on a properly administered polygraph examination, may be able to opine that an accused's physiological responses to certain questions did not indicate deception.

Polygraph examinations were relatively crude when *Frye* was decided. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. at 585, 113 S.Ct. at 2793. The Eleventh Circuit has recognized that, "[s]ince the Frve decision, tremendous advances have been made in polygraph instrumentation and technique." *United States v. Piccinonna,* 885 F.2d 1529, 1532 (11th Cir. 1989); *see also United States v. Galbreth,* 908 F. Supp. 877 (D. N.M. 1995); *United States v. Crumby,* 895 F. Supp. 1354 (D. Ariz. 1995). The effect of Mil.R. Evid. 707 is to freeze the law regarding polygraph examinations without regard for scientific advances. We believe that the truth-seeking function is best served by keeping the door open to scientific advances. *See United States v. Youngberg,* 43MJ 379 (1995) (holding DNA evidence admissible); *United States v. Nimmer,* 43 MJ 252, 260 (1995) (remanding for hearing on reliability of hair analysis evidence). With respect to appellant's case, we, like the Fifth Circuit, cannot determine

"whether polygraph technique can be said to have made sufficient technological advance in the seventy years since *Frye* to constitute the type of 'scientific, technical, or other specialized knowledge' envisioned by Rule 702 and *Daubert.*" *United States v. Posado,* 57 F.3d at 433. We will never know, unless we give appellant an opportunity to lay the foundation.

Like the Court in *Posado,* "We do not now hold that polygraph examinations are scientifically valid or that they will always assist the trier of fact, in this or any other individual case. We merely remove the obstacle of the *per se* rule against admissibility." 57 F.3d at 434. Foundation evidence for proffered polygraph evidence must establish that the underlying theory—that a deceptive answer will produce a measurable physiological response—is scientifically valid. *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. at 592–93. Furthermore, we would expect evidence that the theory can be applied to appellant's case. *Id.* The foundation must include evidence that the examiner is qualified, that the equipment worked properly and was properly used, and that the examiner used valid questioning techniques.

As required by *Daubert,* the military judge must be a gatekeeper and weigh probative value against prejudicial impact in accordance with Mil.R.Evid. 403. We find the *Piccinonna* guidance apt:

> [T]he trial court may exclude polygraph expert testimony because 1) the polygraph examiner's qualifications are unacceptable; 2) the test procedure was unfairly prqudicial or the test was poorly administered; or 3) the questions were irrelevant or improper. The trial judge has wide discretion in this area, and rulings on admissibility will not be reversed unless a clear abuse of discretion is shown.

885 F.2d at 1537; *see also United States v. Pettigrew,* 77 F.3d 1500, 1514 (5th Cir. 1996) (judge's ruling on admissibility of polygraph evidence reviewed for abuse of discretion).

This was not a private, *ex parte* examination under unknown conditions. *See United States v. Sherlin,* 67 F.3d 1208, 1217 (6th Cir. 1995) ("unilaterally" obtained and "privately commissioned" polygraph excluded). To the contrary, appellant proffers a government-initiated examination by an OSI examiner. Accordingly, there would appear to be no need to condition admissibility on having appellant examined by a polygraph examiner chosen by the prosecution. *See United States v. Piccinonna,* 885 F.2d at 1536.

Finally, the issues raised by the dissenting opinion warrant comment. Both *Wood v. Bartholomew,* 116 S.Ct. 7 (1995), and *State v. Ellison,* 676 P.2d 531, 535 (Wash. App. 1984), involve polygraph examinations of prosecution witnesses, not the accused. Our holding, as was that in *Rock,* is limited to an accused's right to lay the foundation for a polygraph examination of himself. We need not and do not address admissibility of polygraph examinations of government witnesses or the question whether such polygraph evidence would be constitutionally required to be disclosed under *Brady v. Maryland,* 373 U.S. 83 (1963). *But cf. United States v. Simmons,* 38 MJ 376 (CMA 1993) (trial counsel failed to discover and disclose contradictory statements of rape prosecutrix made to government polygrapher).

Furthermore, *Bartholomew* involves an issue different from the one in the case before us. It is summary disposition of a habeas corpus case, where the Supreme Court concluded that the Ninth Circuit misapplied the Court's *Brady* jurisprudence. 116 S.Ct. at 8. The Supreme Court noted that polygraph evidence was inadmissible under Washington state law, but premised its holding on the speculative nature of the

additional evidence that might have been discovered, counsel's concession "that disclosure would not have affected the scope of his cross-examination," and the "overwhelming" evidence of guilt. 116 S.Ct. at 10–11. The constitutionality of the state law was not before the Court and therefore, consistent with the Court's practice, it was not addressed. *See United Public Workers of America v. Mitchell,* 330 U.S. 75, 90 n. 22 (1947) ("It has long been this Court's 'considered practice not to decide abstract, hypothetical or contingent questions, . . . or to decide any constitutional question in advance of the necessity for its decision, . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied."')

Montana v. Egelhoff, 116 S.Ct. 2013 (1996), also involves a constitutional issue different from the one before us. *Egelhoff* involves legislative action redefining an element of an offense, not executive rule-making about modes of proof. The President, unlike the Montana legislature, lacks authority to create and define offenses. *See* Art. 36(a), UCMJ, 10 USC § 836(a); *United States v. Hemingway,* 36 MJ 349, 351 (CMA 1993); *United States v. Smith,* 13 USCMA 105, 119, 32 CMR 105, 119 (1962).

In *Egelhoff,* the Supreme Court upheld a statute excluding evidence of voluntary intoxication when a defendant's state of mind is at issue. The statute in question, Mont. Code Ann. § 45–2–203, provided that voluntary intoxication "may not be taken into consideration in determining the existence of a mental state which is an element of [a criminal] offense." 116 S. Ct. at 2016. The Supreme Court's decision is fragmented, with four justices speaking in the plurality opinion, joined by Justice Ginsburg who concurred in the judgment separately; and four other Justices dissented in three separate opinions.

We read the holding in *Egelhoff* as founded on the power of the state to define crimes and defenses. The Montana statute was based on a legislative decision to resurrect "the common-law rule prohibiting consideration of voluntary intoxication" in determining whether the defendant had the requisite mens rea. 116 S.Ct. at 2020. In short, Montana decided to preclude voluntary intoxication from being asserted as a defense. The plurality explained:

> "The doctrines of *actus reus, mens rea,* insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States." *Powell v. Texas,* 392 U.S. 514, 535–536 (1968) (plurality opinion). The people of Montana have decided to resurrect the rule of an earlier era, disallowing consideration of voluntary intoxication when a defendant's state of mind is at issue. Nothing in the Due Process Clause prevents them from doing so, and the judgment of the Supreme Court of Montana to the contrary must be reversed.

116 S.Ct. at 2023–24.

The Montana rule excludes evidence based on the fact to be proven (voluntary intoxication) rather than on the mode of proof. Abolishing a defense is within the authority of a state legislature. On the other hand, Mil.R.Evid. 707 bars otherwise admissible and relevant evidence based on the mode of proof by categorically excluding polygraph evidence. While the plurality opinion in *Egelhoff* questions whether the distinction between the fact to be proved and the method of proving it makes a difference, 116 S. Ct. at 2017 n. 1, only four Justices joined in that observation.

Justice Ginsburg points out in her separate concurrence in *Egelhoff* that the statute does not appear among Montana's evidentiary rules, but in the chapter pertaining to substantive crimes. She opines that the Montana law is "a measure redefining *mens rea,*"and as such is well within the power of a state to define crimes. 116 S. Ct. at 2024–25. The four Justices in the plurality opinion state that they are "in complete agreement" with Justice Ginsburg's analysis. They explain that they "address [the statute] as an evidentiary statute simply because that is how the Supreme Court of Montana chose to analyze it." 116 S. Ct. at 2020–21 n. 4. Justice Ginsburg, along with the four dissenters, recognized that "a rule designed to keep out 'relevant, exculpatory evidence' . . . offends due process." 116 S. Ct. at 2024, 2029.

Finally, we must comment on the dissenter's "floodgate" argument that our opinion will generate an unreasonable burden on the services.__MJ at (6–7). Apart from the speculative nature of such an argument, we think that it is just as likely that polygraph evidence will prevent needless litigation by avoiding some meritless prosecutions as well as smoking out bogus claims of innocent ingestion. Furthermore, we are unaware of any such flood of polygraph cases after our decision in *United States v. Gipson, supra.* Finally, our measure should be the scales of justice, not the cash register.

Decision

The decision of the United States Air Force Court of Criminal Appeals is set aside. The record of trial is resumed to the Judge Advocate General of the Air Force for submission to an appropriate convening authority for a hearing before a military judge. Appellant will be provided an opportunity to lay a foundation for admission of the proffered polygraph evidence. If the military judge decides that the polygraph evidence is admissible, he will set aside the findings of guilty

and the sentence, and a rehearing may be ordered. If the military judge decides that the polygraph evidence is not admissible, he will make findings of fact and conclusions of law. The record will be sent directly to the Court of Criminal Appeals for expeditious review. Thereafter, Article 67, UCMJ, 10 USC 867 (1989), will apply.

Chief Judge COX and Senior Judge EVERETT concur.

SULLIVAN, Judge (dissenting):

I dissent for the reasons stated in my separate opinion in *United States v. Williams,* 43 MJ 348, 356–57 (1995) (Sullivan, C.J., concurring in the result).

CRAWFORD, Judge (dissenting):

We have held that "[t]he defendant has the right to present legally and logically relevant evidence at trial." *United States v. Woolheater,* 40 MJ 170, 173 (CMA 1994). But as all the Judges of this Court agreed in *Woolheater,* this is "not [an] absolute" right, *id.; see also Montana v. Egelhoff,* 116 S. Ct. 2013, 2017, 2026 (1996); and may yield to valid "policy considerations," 40 MJ at 173; *id.; United States v. Bins,* 43 MJ 79, 83 (1995) (citing *Woolheater,* 43 MJ at 84); *United States v. Schaible,* 11 USCMA 107, 111, 28 CMR 331, 335 (1960) .

None of the cases cited by the majority hold that there is a constitutional right to admit an exculpatory polygraph examination. Assuming polygraphs are relevant and reliable, there is ample justification for Mil.R.Evid. 707, Manual for Courts-Martial, United States (1995 ed.). This justification satisfies the provisions of Article 36(a), Uniform Code of Military Justice, 10 USC 836(a), that the rules of procedure and evidence "generally recognized" in federal trials be applied to courts-martial "so far as he [The President] considers practicable."

Through dicta and implicit holdings the Supreme Court has signaled that there is no constitutional right to introduce polygraph evidence. Exclusion of exculpatory evidence does not contravene fundamental "principle[s] of justice . . . rooted in the traditions and conscience of our" society. *Patterson v. New York*, 432 U.S. 197, 202 (1977).

In *McMorris v. Israel*, 643 F.2d 458 (1981), the Court of Appeals for the Seventh Circuit stated that "polygraph evidence [may be] materially exculpatory within the meaning of the Constitution." 643 F.2d at 462. In dissenting to the denial of *certiorari* in that case, then-Justice Rehnquist characterized McMorris as a "dubious constitutional holding." *Israel v. McMorris*, 455 U.S. 967, 970 (1982).

In *Wood v. Bartholomew*, 116 S. Ct. 7 (1995), the Court summarily denied habeas corpus for the prosecution's failure to disclose information pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). The basis for the defense allegation was that the prosecution failed to reveal polygraph examinations and statements by the defendant's brother and his girlfriend, the two key prosecution witnesses at trial.[1] These polygraphs and their statements would have undermined the witnesses' testimony at trial and supported the defense theory.

The defendant's brother testified at trial that, while he and his brother sat in the car in the laundromat parking lot, the defendant said "that he intended to rob the laundromat and 'leave no witnesses.'" The prosecution offered evidence that both the brother and girlfriend left a short while later and went to the girlfriend's house. The girlfriend also testified that

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[1]This Court in the past has looked at *Brady v. Maryland*, 373 U.S. 83 (1963), and its military counterpart as to its impact on prosecution witnesses as in *Wood v. Bartholomew*, 116 S.Ct. 7 (1995), and reversed a conviction. *United States v. Simmons*, 38 MJ 376, 380–82 (CMA 1993).

when the defendant arrived at her house, he told her that he "put two bullets in the kid's head." She also heard the defendant "say that he intended to leave no witnesses." 116 S.Ct. at 8–9.

At trial the defendant testified that he forced the attendant "to lie down on the floor." While removing the cash, he "accidently fired" a bullet into the victim's head. The defendant "denied telling" his brother and the girlfriend "that he intended to leave no witnesses." Moreover, he said that his brother "assisted" him. 116 S.Ct. at 9.

Under Washington State law, polygraph evidence is inadmissible. *State v. Ellison*, 676 P.2d 531, 535 (Wash. App. 1984). Even so, prior to trial, the prosecution requested that the two key witnesses take a polygraph examination. The polygrapher noted that the girlfriend's answers to the "questions were inconclusive." The polygrapher asked the defendant's brother whether (1) he had "assisted" in the robbery, and (2) whether at any time he was with his brother in the laundromat. The examiner said that his negative responses showed "deception." The prosecution did not disclose these examinations to defense counsel. 116 S.Ct. at 9. In denying relief because of failure to disclose the polygraph examinations, the Supreme Court noted that, during the habeas corpus hearing, "counsel obtained no contradictions or admissions" from the defendant's brother. 116 S. Ct. at 11. Clearly, if polygraph examinations were admissible, polygraph results would have impeached the witnesses. *Thus, the results on appeal would have been different.*

The implicit holding in *Wood* has been reinforced in *Montana v. Egelhoff*, 116 S. Ct. 2013 (1996). In *Egelhoff* the Supreme Court held that a state may exclude evidence of voluntary intoxication as it relates to the *mens rea* element of a criminal offense. When interpreting Supreme Court decisions, it is instructive and helpful to look beyond the

specific holding to the debate of broader principles of jurisprudence.

In *Egelhoff*, eight Justices agreed that there may be valid policy reasons to exclude relevant, reliable evidence. 116 S.Ct. at 2017, 2026. While the eight Justices debated the "*Chambers* principle," *id.* at 2022, Justice Ginsburg, concurring in the judgment, looked "[b]eneath the labels" in concluding that a state legislature's redefinition of *mens rea* "encounters no constitutional shoal." *Id.* at 2024.

Justice Scalia, speaking for four other Justices, described *Chambers* as a "highly case-specific error correction" case as well as a "fact-intensive case." He concluded that there is no violation of a defendant's right of defense "whenever 'critical evidence' favorable to him is excluded"; on the other hand, "erroneous evidentiary rulings can, in combination, rise to the level of a due process violation." *Id.* at 2022. The plurality then emphasized that Fed.R.Evid. 403 and 802 result in exclusion of relevant, reliable evidence. *Id.* at 2017.

Justice O'Connor, dissenting and joined by three other Justices, agreed the "defendant does not enjoy an absolute right to present evidence relevant to his defense." *Id.* at 2026. Her dissent rejected the plurality argument that because evidence of voluntary intoxication was excluded at common law, it should be excluded in this case. *Id.* at 2029–31. Justice O'Connor asserted that to exclude the evidence would prohibit a defendant from having a "fair opportunity to put forward his defense." *Id.* at 2031. She emphasized that this concept was "universally applicable." *Id.* at 2030. In any event, she concluded that the state had not set forth "sufficient justification," *id.* at 2027, to exclude involuntary intoxication to negate the mental element of a defense. She agreed with Justice Ginsburg that a state could redefine an offense to render "voluntary intoxication irrelevant," but concluded that the State of Montana did not evidence such an intent. *Id.* at

2031. Justice O'Connor also rejected the plurality's characterization of *Chambers*. *Id.* at 2026–27.

Justice Souter agreed that the "plurality opinion convincingly demonstrates that . . . the common law . . . rejected the notion that voluntary intoxication might be exculpatory, or was at best in a state of flux. . . ." *Id.* at 2032 (citation omitted). Thus, a state may ttexclude even relevant and exculpatory evidence if it presents a valid justification for doing so." *Id.* at 2032.

However, in separate opinions, Justices Breyer and Souter stated that the State of Montana had not provided for exclusion of voluntary intoxication from the *mens rea* element of an offense. In summary, in *Egelhoff* eight Justices of the Court recognized that relevant, reliable evidence may be excluded if there is a valid policy reason for doing so.

Mil.R.Evid. 707 was "based on several policy grounds." The policy grounds set forth in the Analysis are not exclusive. These grounds include the risk of being treated with "near infallibility"; "danger of confusion of the issues"; and a waste of time on collateral matters. Drafters' Analysis, Manual, *supra* (1995 ea.) at A22–48.

An additional policy concern is the impact in terms of practical consequences. Unfortunately, the majority overlooks the practical consequences of its decision on a worldwide system of justice. Our Court sees the cases that are at the end of a long funnel. There are approximately 4,000 general courts-martial per year. Annual Report, 39 MJ CXLVII, CLIX, CLXXIV, CLXXVII (1992–93). However, across the services, there are approximately 100,000 criminal actions per year. Statistically more than 20 percent of these involve drug cases like the present case. The majority fails to recognize that a concomitant right of presenting polygraph evidence is the right to demand a polygraph examination during the investigative stage. This may well impose a practical

impossibility on the services. Additionally, if an individual were accused of a minor crime for which she was to be given a captain's mast, she could claim a right to a polygraph examination.[2] Thus, the practical policy consequences set forth in the analysis established a valid governmental interest in precluding admissibility of polygraph examinations. This rule is not inconsistent with the rule in the Federal courts.

Professors Giannelli and Imwinkelried state, "A majority of jurisdictions follow the traditional rule, holding polygraph evidence inadmissible per se." P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 8–3(A) at 232 (2d ed. 1993 and 1995) (citing many cases). Further, "[a] substantial minority of courts admit polygraph evidence upon stipulation of the parties." *Id.* § 8–3(B) at 236. But "[a] few courts recognize a trial court's discretion to admit polygraph evidence even in the absence of a stipulation." *Id.* § 8–3(C) at 240.

While the Federal courts are split as to admissibility of polygraphs, some, like *United States v. Posado,* 57 F.3d 428 (5th Cir. 1995), have admitted polygraph evidence at suppression hearings or pursuant to a stipulation. *United States v. Piccinonna,* 885 F.2d 1529, 1536 (11th Cir. 1989). This is not unlike admitting hearsay at suppression hearings. In any event, the Federal courts have not faced the issue of a rule precluding admissibility of polygraph evidence in a worldwide system of justice. California, which does have a rule similar to the military and applies the *Kelly-Frye* (so named after *People v. Kelly,* 549 P.2d 1240 (Cal. 1976), and

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[2]*See e.g., United States v. Bass,* 11 MJ 545 (ACMR 1981) (refusal to accept Article 15 resulted in a general court-martial and 8 years' confinement. There have been other instances where Article 15s have resulted in more serious dispositions. *See,.e.g., United States v. Brock,* No. 96–0673, *pet. granted* (July 12, 1996); *United States v. Zamberlan,* 44 MJ 69 (1996).

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)) test, has held that there is no constitutional right to introduce exculpatory polygraph examinations. *See, e.g., People v. Kegler,* 197 Cal. App. 3d 72, 84-90, 242 Cal. Rptr. 897, 905–09 (1987).

Since Mil.R.Evid. 707 is based on valid policy grounds, it satisfies the Constitution and the requirement in Article 36(a) that the rules of procedure and rules of evidence conform to those in Federal trials "so far as he [The President] considers practicable." If one carried the view of the majority to its logical conclusion, it calls into question various procedural and evidentiary rules. *See, e.g.,* Mil.R.Evid. 502–12 and 803(6); RCM 305(h)(2)(B). Unfortunately this path reminds me of earlier forays by this Court. *See, e.g., United States v. Larneard,* 3 MJ 76, 80, 83 (1977); *United States v. Heard,* 3 MJ 14, 20 n.12 (1977); *United States v. Hawkins,* 2 MJ 23 (1976); *United States v. Washington,* 1 MJ 473, 475 n.6 (1976). *But see United States v. Newcomb,* 5 MJ 4, 7 (CMA 1978) (Cook, J., concurring).

To the extent the majority suggests that *Egelhoff* is distinguishable because it involves a legislative act rather than rulemaking by an executive, I have two responses. First, just as the Supreme Court treats Federal Rules of Criminal Procedure the same as statutes, so should we. *See, e.g., Bank of Nova Scotia v. United States,* 487 U.S. 250, 255 (1988). Second, in *Loving v. United States,* 116 S. Ct. 1737, 1748 (1996), the Supreme Court recognized that the President as Commander-in-Chief has been delegated "wide discretion and authority." The Court upheld the delegation of authority to the President to promulgate aggravating factors in a death penalty case. Loving left open the question the extent of The President's authority under Article 36 alone. *Id.* at 1749.

For the aforementioned reasons, I dissent.

APPENDIX B

UNITED STATES

v.

Airman Edward G. SCHEFFER,
FR554–85–0300, United States Air Force

ACM 30304

U.S. Air Force Court of Criminal Appeals

Sentence Adjudged 17 Oct. 1992

Decided 5 Jan., 1995

Accused was convicted by general court-martial, H. Martin Jayne, J., of making and uttering checks without sufficient funds, wrongfully using methamphetamine, failing to go to appointed place of duty, and unauthorized absence, and he appealed. The United States Air Force Court of Criminal Appeals, Young, J., held that: (1) President was within his authority in refusing to admit polygraph examinations; (2) accused was entitled to one-day pretrial confinement credit against his sentence; and (3) trial was begun within required 120 days.

Affirmed as modified.

Pearson, J., filed opinion concurring in part and dissenting in part with which Schreier, J., joined.

1. Military Justice ⚷ 510

Military Rules of Evidence and all other provisions of Manual for Courts-Martial are accorded force of law, unless they conflict with Uniform Code of Military Justice (UCMJ). Military Rules of Evid., Rule 707.

2. Military Justice ⚷ 510

Military Rule of Evidence will not be declared unconstitutional absent clear showing that President exceeded discretionary powers conferred on him. Military Rules of Evid., Rule 707(a).

3. Military Justice ⚷ 527

Military members are afforded protections guaranteed by United States Constitution, except for those which are expressly or by necessary implication inapplicable.

4. Constitutional Law ⚷ 278.6(2)

Military Justice ⚷ 530, 1124

Both right to due process under Fifth Amendment and right to compulsory process under Sixth Amendment apply to service members at courts-martial. U.S.C.A. Const. Amends. 5, 6.

5. Military Justice ⚷ 1124

In military cases, evidence is constitutionally required if it is relevant, martial, and favorable to defense.

6. Military Justice ⚷ 1025, 1124

For purposes of determining whether evidence is admissible, evidence is "relevant" if it is vital to defense when evaluated in context of entire record.

See publication Words and Phrases for other judicial constructions and definitions.

7. Military Justice ⚷ 1026

Evidence, though relevant, may be inadmissible if other legtimate interests in criminal trial process outweigh need to present relevant evidence based on close examination of competing interests.

8. Military Justice ⚷ 1026, 1124

Close examination of competing interests is required if rule on admissibility of evidence significantly diminishes accused's right to present evidence and cross-examine witnesses against him.

9. Military Justice ⚷ 1020

To be admissible, scientific evidence must be relevant, its probative value must not be substantially outweighted by danger of unfair prejudice or potential for cunfusion, and it must assist trier of fact in understanding evidence or determining fact in issue.

10. Military Justice ⚷ 1025, 1124

For purposes of examining constitutional challenges to rules of evidence which prohibit accused from presenting evidence, court considers whether testimony is relevant and vital to defense in context of entire record, whether rule arbitrarily limits accused's ability to present reliable evidence, whether rule arbitrarily limits admission by defense to greater degree than by prosecution, and whether rule arbitrarily infringes on rights of accused to testify on his own behalf.

11. Military Justice ⚷ 510, 1023

President's prohibition of admission of polygraph evidence is constitutionally permissible exercise of authority to prescribe modes of proof for trials by courts-martial.

12. Military Justice ⚷ 1023

While polygraph evidence may be relevant to credibility of witness, it is not necessarily vital to assessment of credibility and thus not automatically admissible.

13. Military Justice ⚷ 1023

President's decision not to admit polygraph evidence was not arbitrary in light of valid concerns of reliability of any particular polygraph evidence.

14. Military Justice ⚷ 510, 1023

Fact that military judges are often called on to resolve issues similar to those concerns expressed in promulgating rule on admissibility of polygraph evidence or that Department of Defense uses polygraph as investigative tool does not bar President from determining that probative value of polygraph evidence is substantially outweighted by other factors. Military Rules of Evid., Rule 707.

15. Military Justice ⚷ 510, 1023

While it might be arbitrary for President to promulgate rule which prohibits admission of evidence which is assigned to top scientific class, polygraph evidence is not such evidence, and it is not arbitrary to prohibit admission of techniques which fall into middle or bottom classes which are by definitionless reliable. Military Rules of Evid., Rule 707(a).

16. Constitutional Law ⚷ 278.6(2)

Military Justice ⚷ 1023

Military Rule of Evidence prohibiting presentation of

polygraph evidence, whether in favor of accused or of prosecution, did not unconstitutionally infringe on accused's right to due process and to present defense. Military Rules of Evid., Rule 707.

17. Military Justice ⚷ 940

Person arrested without warrant must be given prompt judicial determination of probable cause as prerequisite to pretrial detention. R.C.M. 305(d, h).

18. Military Justice ⚷ 936

Probable cause determinations made more than 48 hours after arrest are presumptively untimely and burden shifts to government to show existence of bona fide emergency or other extraordinary circumstance justifying delay. R.C.M. 305(d, h).

19. Military Justice ⚷ 936, 940

When accused's official custody is not at direction of military authority and military makes reasonably diligent efforts to secure physical custody over accused, the 48-hour period after arrest in which probable cause determination must be made does not begin until commander actually orders accused into pretrial confinement.

20. Military Justice ⚷ 936, 940

Even if 48-hour period for showing probable cause began when military authority requested accused be detained in Iowa, military exigencies of getting accused back to Air Force Base overcame presumption that probable cause determination was untimely.

21. Military Justice ⚷ 938.1

Commander was neutral and detached, for purposes of initial confinement order and decision to continue confinement, even though commander later preferred charges against accused, absent evidence of record to suggest that commander was either directly or particularly involved in command's law enforcement function.

22. Military Justice ⚷ 939, 1324

Although commander lacked probable cause to place accused in pretrial confinement, after commander filed memorandum there was support for decision to retain confinement, and thus accused was entitled to credit of one-day pretrial confinement against his sentence.

23. Military Justice ⚷ 1170, 1172

Regardless of rule that accused be brought to trial within 120 days of preferral of charges, imposition of restraint, or entry on active duty, prosecution must take immediate steps to bring accused to trial. R.C.M. 707(a).

24. Military Justice ⚷ 1176, 1177

Prosecution was timely where 34-day delay was at accused's request and accused was brought to trial on 120th day, not counting 34-day delay, from date of his initial apprehension.

Appellate Counsel for Appellant: Colonel Terry J. Woodhouse, Colonel Jay L. Cohen, Lieutenant Colonel Frank J. Spinner, and Captain Del Grissom.

Appellate Counsel for the United States: Colonel Jeffery T. Infelise and Captain Jane M.E. Peterson.

EN BANC DIXON, SNYDER, RAICHLE, HEIMBURG, YOUNG, PEARSON, SCHREIER, GAMBOA, and BECKER, JJ.

OPINION OF THE COURT

YOUNG, Judge:

Contrary to his pleas, appellant was convicted of making and utterin 17 checks, totaling over $3,300, without sufficient funds in his account, wrongfully using methamphetamine, failing to go to his appointed place of duty, and a 13-day unauthorized absence. Artilces 123a, 112a, and 86, UCMJ, 10 U.S.C. §§ 923a, 912a, 886 (1988). Court members sentenced him to a bad-conduct discharge, confinement for 30 months, total forfeitures, and reduction to E–1. Appellant assigns three errors: (1) the military judge erred by refusing to admit into evidence the results of appellant's exculpatory polygraph examination; (2) the charges should have been dismissed for lack of a speedy trial; and (3) appellant is entitled to 5 days credit because his pretrial confinement was not reviewed by a neutral and detached magistrate within 48 hours of incarceration. We order appellant be given credit for 1 day of illegal pretrial confinement. We find no error which affects the findings or sentence.

I. Admissibility of Polygraph Results

A. Facts

Appellant, apparently on his own initiative, agreed to assist the Air Force Office of Special Investigations (AFOSI) with drug investigations. His AFOSI handler advised appellant that from time to time they would ask him to provide urine specimens to be tested for drugs and to submit to polygraph examinations. On 7 April 1992, AFOSI Special

Agent Shilaikis asked appellant if he would consent to a urinalysis. Appellant agreed, but declined to provide a urine sample until the following day. He claimed he only urinated one time a day, and he had already done so. He asked for, and received permission to continue his undercover work that evening. The following day, he provided a urine specimen. On 10 April 1992, appellant took an AFOSI polygraph. During the examination, appellant answered "no" to the following relevant questions:

(1) Since you've been in the AF, have you unsed any illegal drugs?

(2) Have you lied about any of the drug information you've given OSI?

(3) Besides your parents, have you told anyone you're assisting OSI?

The examiner opined that appellant's polygraph charts "indicated no deception to the above questions." On approximately 14 May 1992, the AFOSI agents learned appellant's urine specimen had tested positive for methamphetamine.

B. The Issue

At trial, appellant moved to admit the results of the polygraph despite the proscription of Mil.R.Evid. 707; the prosecution objected. The military judge ruled that the Constitution did not prohibit the President from promulgating a rule excluding polygraph evidence from admission in trials by courts-martial, and he denied appellant's request to lay a foundation for its admission. Appellent testified on his own behalf and denied knowingly using methamphetamine.

Mil.R.Evid. provides:

> (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a

> polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.
>
> (b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

According to the drafters' analysis, Mil.R.Evid. 707 is based on the following policy grounds: (1) the "danger court members will be misled by polygraph evidence that 'is likely to be shrouded with an aura of near infallibility'" (quoting *United States v. Alexander,* 526 F.2d 161, 168–69 (8th Cir. 1975); (2) "to the extent that the members accept polygraph evidence as unimpeachable or conclusive, despite cautionary instructions from the military judge, the members' traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence is preempted'" (*Id.*); (3) the danger of confusion of the issues which "could result in the court-martial degenerating into a trial of the polygraph machine"; (4) presentation of plygraph evidences "can result in a substantial waste of time when collateral issues regarding the reliability of the particular test and qualifications of the specific polygraph examiner must be litigated in every case"; (5) "[t]he reliability of polygraph evidence has not been sufficiently established and its use at trial impinges upon the integrity of the judicial system." *Manual for Courts-Martial, United States, 1984,* App. 22 at A22–46 (1994 ed.); *see United States v. Helton,* 10 M.J. 820 n. 10 (A.F.C.M.R. 1981) (concise description of the complex combination of theory, precise measurement techniques, and subjective interpretation required to support validity of polygraph).

C. Presidential Authority to Promulgate Mil.R.Evid. 707(a)

The Constittion vests in Congress the power to make

rules "for the Government and Regulation of the land and naval forces." U.S. Const. art, I. § 8, cl. 14. The Constitution also gives Congress the power to make all laws necessary to execute this power. U.S. Const. art. I, § 8, cl. 18. Congress executed this power by enacting the Uniform Code of Military Justice (UCMJ). In the UCMJ, Congress delegated to the President the authority to prescribe the modes of proof before trials by courts-martial, "in regulations, which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recongized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with [the UCMJ]." Article 36(a), UCMJ, 10 U.S.C. § 836(a) (1994). Article 36(a) is unquestionably a valid Congressional delegation. *See United States v. Smith,* 13 U.S.C.M.A. 105, 32 C.M.R. 105, 118–19, 1962 WL 4459 (1962); *accord United States v. Weiss,* 36 MJ 224, 238 (C.M.A. 1992) (Crawford, J., concurring in the result), *aff'd,* — U.S. —, 114 S.Ct. 752, 127 L.Ed.2d. 1 (1994).

Pursuant to Article 36(a), UCMJ, the President promulgated Mil.R.Evid. 707, and the Manual for Courts-Martial in which it is found. *See* Exec. Order No. 12,767, 56 Fed. Reg. 30,284 (1991). Thus, the question we must resolve is rather narrow in scope. It is not whether polygraph examinations should be admissible in trials by courts-martial, but whether the President may constitutionally prohibit their admission.

[1, 2] "'[O]ne of the first principes of constitutional adjudication [is the] basic presumption of the constitutional validity of a duly enacted state or federal law.'" *Lemon v. Kurtzman,* 411 U.S. 192, 208, 93 S.Ct. 1463, 1473, 36 L.Ed.2d 151 (1973) (quoting *San Antonio School District v. Rodriguez,* 411 U.S. 1, 60, 93 S.Ct. 1278, 1311, 36 L.Ed.2d 16 (1973) (Stewart, J., concurring)). We must accord Mil.R.Evid. 707, and all other provisions of the Manual for

Courts-Martial, the force of law, unless it conflicts with the UCMJ. *Noyd v. Bond,* 395 U.S. 683, 692, 89 S.Ct. 1876, 1882, 23 L.Ed.2d 631 (1969); *Smith,* 32 C.M.R. at 119. Accordingly, we will not declare Mil.R.Evid. 707(a) unconstitutional in the absence of a clear showing that the President exceeded the discretionary powers conferred upon him by Article 36(a). *United States v. White,* 3 U.S.C.M.A. 666, 14 C.M.R. 84, 88, 1954 WL 2095 (1954).

D. The Rights to Due Process and Compulsory Process

[3, 4] Military members are afforded the protections guaranteed by the United States Constitution, except for those which are expressly or by necessary implication inapplicable. *United States v. Stombaugh,* 40 M.J. 208 211–12 (C.M.A. 1994). Both the right to due process under the Fifth Amendment and the right to compulsory process under the Sixth Amendment apply to service members at courts-martial. *Stombaugh,* 40 M.J. at 212; *United States v. Graf,* 35 M.J. 450, 454 (C.M.A. 1992), *cert, den.,* — U.S. —, 114 S.Ct. 917, 127 L.Ed.2d 206 (1994).

[5] The Supreme Court has held that evidence is constitutionally required if it is relevant, material, and favorable to the defense. *United States v. Valenzuela-Bernal,* 458 U.S. 858, 867, 102 S.Ct. 3440, 3446, 73 L.Ed.2d 1193 (1982). The Court of Military Appeals has "unequivocally" adopted this holding for military cases. *United States v. Williams,* 37 M.J. 352, 361 (C.M.A. 1993) (citing *United States v. Dorsey,* 16 M.J. 1 (C.M.A. 1983)).

[6] The Military Rules of Evidence have combined the common law concepts of relevance and materiality into one rule of relevance. *See* S. Saltzburg, L. Schinasi, & D. Schlueter, *Military Rules of Evidence Manual* 422 (3d ed. 1991).

> "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Mil.R.Evid. 401. But, in anayzing relevance, we still must confront two questions: (1) Does the evidence have any tendency to make the existence of any fact more or less probable?; and (2) Is that fact of consequence to a determination of appellant's guilt?

What "favorable to the defense" means has been the subject of varying opinions; however, the Supreme Court specifically rejected the "conceivable benefit" test. "If we require only a showing that a witness could provide some 'conceivable benefit' to the defense, then 'the number of situations which will satisfy this test is limited only by the imaginations of judges or defense counsel.'" *Williams,* 37 M.J. at 361 (Gierke, J., concurring) (quoting *Valenzuela-Bernal,* 458 U.S. at 866–67, 102 S.Ct. at 3446). It appears the Supreme Court requires that the evidence be "vital to the defense" when "evaluated in the context of the entire record." *Valenzuela-Bernal,* 458 U.S. at 867–68, 102 S.Ct. at 3446–47.

[7, 8] "Of course, the right to present relevant testimony is not without limitation. The right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" *Rock v. Arkansas,* 483 U.S. 44, 55, 107 S.Ct. 2704, 2711, 97 L.Ed.2d 37 (1987) (quoting *Chambers v. Mississippi,* 410 U.S. 284, 295, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297 (1973)). Procedural and evidentiary rules to control the presentation of evidence which are "designed to assure both fairness and reliability in the ascertainment of guilt and innocence" are premissible. *Chambers,* 410 U.S. at 302, 93 S.Ct. at 1049; *see Washington v. Texas,* 388 U.S. 14, 23 n. 21, 87 S.Ct. 1920, 1925 n. 21, 18 L.Ed.2d 1019 (1967).

But, when the rule denies or significantly diminishes appellant's right to present evidence or to confront and cross-examine the witnesses against him, the competing interests must be closely examined. *Chambers,* 410 U.S. at 295, 93 S.Ct. at 1046 (citing *Berger v. California,* 393 U.S. 314, 315, 89 S.Ct. 540, 541, 21 L.Ed.2d 508 (1969)). As *Rock, Chambers* and *Washington* are the most relevant Supreme Court cases to this inquiry, we will examine them in some detail.

E. The Case Law

Washington was convicted of murdering his former paramour's new boyfriend. Washington testified that a man named Fuller actually did the shooting and that he had tried to stop Fuller. Fuller, who had already been convicted of the murder, would have corroborated Washington's testimony, but his testimony was barred under Texas law. Two Texas statutes provided that persons charged or convicted as co-participants in the same crime could not testify for one another. The Supreme Court held that Washington was "denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." *Washington,* 388 U.S. at 23, 87 S.Ct. at 1925. The exclusion of this testimony was clearly arbitrary because it applied only to the defense, did not apply if the accomplice had been acquitted at his own trial, and "leaves [the accomplice] free to testify when he has a great incentive to prejury, and bars his testimony in situations where he has a lesser motive to lie." *Id.*

Chambers was convicted of murdering a policeman, Office Liberty. McDonald, who was at the scene of the

shooting, provided Chambers' attorneys with a signed, sworn confession to shooting the policeman with his own pistol which he subsequently discarded. McDonald also admitted to telling a friend that he had done the shooting. McDonald later repuditated his confession. At trial, a friend of McDonald testified that he saw McDonald shoot the victim. A cousin of the vicitim testified that right after the shooting he saw McDonald with a pistol in his hand. When the State chose not to call McDonald, Chambers did. McDonald admitted confessing to the murder and his written confession was introduced. On cross-examination by the State, McDonald stated that he had recanted, he did not commit the murder, and he had only confessed because of promises that he would not go to jail and would share in a sizable tort recovery. The judge denied Chamber's motion to examine McDonald as an adverse witness because the State's "voucher" rule prevented a party from impeaching its own witness.

Chambers called three of McDonald's friends to testify. Hardin testified that on the night of the murder, McDonald admitted killing the victim. The judge sustained the State's objection that the testimony was hearsay and told the jury to disregard it because the State did not recognize declarations against penal interests as an exception to the hearsay rule. Turner testified, contrary to McDonald, that he was not with McDonald at the time of the shooting. The judge sustained the prosecution's hearsay objection to Turner's testimony that McDonald had admitted shooting the victim and had later asked Turner not to implicate him in the murder. Carter had been McDonald's friend for about 25 years. The day after the murder, McDonald told Carter he had killed Office Liberty and disposed of the weapon. The judge refused to permit Carter to testify before the jury. Thus, as a result of the "party witness" or "voucher" rule and the State's hearsay rule, Chambers was "unable either to cross-examine McDonald or to present witnesses in his own behalf who would have

discredited McDonald's repudiation and demonstrated his complicity." *Chambers,* 410 U.S. at 294, 93 S.Ct. at 1045. The Supreme Court held that Chambers was denied a fair trial in violation of the Due Process Clause of the Fourteenth Amendment because (1) the application of the "voucher" rule deprived him of the opportunity to contradict testimony that was clearly adverse, and (2) the trial judge erred by excluding reliable, corroborated, hearsay evidence critical to Chambers' defense. The Court made clear that such rules of evidence were not *per se* unconstitutonal. They are unconstitutional only to the extent their application denies an accused a fair trial.

Rock shot her husband to death. When police arrived on the scene, Rock told them her husband had choked her and thrown her against the wall, she had picked up the pistol, appellant hit her again, and she shot him. Because she could not remember the exact details of the shooting, Rock's attorney suggested she submit to hypnosis in order to refresh her memory. During the two hypnosis sessions, Rock did not relate any new information; however, after the hypnosis, she remembered that her finger was not on the trigger, and the gun had discharged when her husband grabbed her arm during the scuffle. As a result, the pistol was examined by an expert who opined that the gun was defective and prone to fire when hit or dropped. The Arkansas rules of evidence barred all testimony that had been hynotically refreshed. Upon motion by the prosecution, the judge limited Rock's testimony to the sketchy notes the hypnosis expert had made of her pre-hypnosis description of the shooting. The Supreme Court held that a *per se* rule which resulted in excluding the testimony of a hypnotically refreshed accused impermissibly infringed the right of an accused to testify on her own behalf. *Rock,* 483 U.S. at 62, 107 S.Ct. at 2714. The Court declined to express an opinion as to the constitutionality of a rule that would prohibit the hypnotically refreshed testimony of witnesses

other than criminal defendants. *Rock,* 483 U.S. at 58, n. 15, 107 S.Ct. at 2712 n. 15.

[9] In the early years of the UCMJ, the *per se* exclusion of polygraph evidence was established by case law. *See United States v. Massey,* 5 U.S.C.M.A. 514, 18 C.M.R. 138, 144, 1955 WL 3296 (1955); *United States v. Pryor,* 2 C.M.R. 365, 370–71, 1951 WL 2249 (A.B.R. 1951). No doubt based on this early case law, the President prohibited the admission into evidence of conclusions based upon polygraph tests in the *Manual for Courts-Martial, United States, 1969 (Rev.),* ¶ 142*e*. *See* Department of the Army Pamphlet 27–2, *Analysis of Contents, Manual for Courts-Martial, United States 1969, Revised Edition,* at 27–14 (1970). On 12 March 1980, the President substituted the Military Rules of Evidence for the evidentiary rules formerly contained in Chapter XXVII of the Manual for Courts-Martial. Exec. Order 12198, 45 Fed. Reg. 16,945 and 16,993 (1980). The new rules, based on the Federal Rules of Evidence, did not prohibit polygraph evidence and provided a new way of looking at expert evidence. *See United States v. Gipson,* 24 M.J. 246, 250–52 (C.M.A. 1987); *accord Daubert v. Merrell, Dow Pharmaceuticals, Inc.,* — U.S. —, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Gone was the test of *Frye v. United States,* 293 F. 1013 (D.C.Cir. 1923), which required the proponent of scientific evidence to establsih, as a foundation, that the evidence was of a type generally accepted in the scientific community. In its place, the President promulgated Mil.R.Evd. 401, 402, 403, and 702. *See United States v. Rodriguez,* 37 M.J. 448 (C.M.A. 1993); *Gipson,* 24 M.J. at 251. To be admissible, the scientific evidence must be relevant (Mil.R.Evid. 401 and 402); its probative value must not be "substantially outweighted by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence" (Mil.R.Evid. 403); and

must "assist the trier of fact to understand the evidence or to determine a fact in issue" (Mil.R.Evid. 702). Of course, in evaluating whether the evidence is probative and helpful to the fact finder, the military judge should consider the degree of acceptance in the scientific community. *Gipson,* 24 M.J. at 252.

In *Gipson,* the Court of Military Appeals divided scientific evidence into three classes: (1) evidence for which "the principles underlying the expertise are so judicially recognized that it is unnecessary to reestablish those principles in each and every case, such as fingerprints, ballistics, or x-ray evidence; (2) evidence for which the principles can neither be accepted nor rejected out of hand; and (3) evidence based on practices and techniques that "have been so universally discredited that a trial judge may safely decline even to consider them, as a matter of law." *Gipson,* 24 M.J. at 249. The Court assigned the polygraph to the middle class and specified several reasons which precluded assigning it to the top class of scientific evidence: (1) criticism of the scientific principles on which the polygraph and the polygrapher's opinion is based; (2) the importance of the precision of the questions, the way the examiner intended them, and the examinee understood them: (3) the examinee's state of mind; and (4) other conditions such as whether the examinee was taking medications, illegal drugs, or attempting countermeasures to control the physical responses to be recorded by the polygraph. *Gipson,* 24 M.J. at 248–49; *see* 1 P. Giannelli & E. Imwinkelried, *Scientific Evidence,* § 8–3(A) (2d ed. 1993) (the authors' formulation of the issues: "the lack of empirical validation, the numerous uncontrollable factors involved in the examination, the subjective nature of the deception determination, and the absence of adequate standards for assesing the qualifications of examiners.") *Helton.*

Despite tht Court's concerns, it held that polygraph evidence was not *per se* inadmissible and an accused is entitled to attempt to lay foundational predicates for its admission. Of course, admissibility would depend on the competence of the examiner, the suitability of the examinee, the nature of the particular testing process employed, and other factors. *Gipson,* 24 M.J. at 252–53. By adopting Mil.R.Evid. 707, the President overuled *Gipson* as it applied to polygraph evidence.

The President promulgated Mil.R.Evid. 707 on June 27, 1991, to apply to all cases in which arraignment had been completed on or after 6 July 1991. Exec. Order 12,767, 56 Fed.Reg. 30,284 (1991). The Army Court of Military Review is the only appellate court to have directly addressed the constitutinality of this rule. *See United States v. Williams,* 39 M.J. 555 (A.C.M.R. 1994). In *Williams,* the accused admitted misappropriating three of eighteen unauthorized disbursements from the Chaplain's Fund and "passed" a polygraph exam which focused on other unauthorized disbursements. Williams claimed that the trial court's decision not to admit the polygraph evidence "impacted greatly" on his decision not to testify before findings. *But see Gipson,* 24 M.J. at 253 (Court of Appeals "would ot condone [the admission of] such opinion testimony absent the examinee's consistent testimony"). Nevertheless, the Army Court examined the reasons the drafters gave for the rule. The Court found several of those reasons to be "in the nature of matters that are routinely resolved by trial judges under Mil.R.Evid. 403," and the final reason (concerns about reliability) to be "in its worst light, disingenuous, and at best incongruous with the substantial investment the Department of Defense has made, and continues to make in polygraph examinations—not to mention observation in *Gipson* that '[t]he greater weight of authority indicates that [the polygraph] can be a helpful scientific tool.'" *Williams,* 39 M.J. at 555 (quoting *Gipson,* 24

M.J. at 249). Based on its reading of *Washington, Chambers,* and *Rock,* the Court went on to hold, "under the facts presented," the appellant's

> Fifth Amendment right to a fair trial by court-martial, combined with his Sixth Amendment right to produce favorable witnesses on his behalf, affords him the opportunity to be heard of these foundational matters, and allows for the possibility of admitting polygraph evidence, notwithstanding the explicit prohibition of Mil.R.Evid. 707.

Williams, 39 M.J. at 555. Although the Army Court appears to have restricted its opinion to the facts of the case, we are unable to discern what circumstances would trigger a different result.

F. Analysis

[10] We believe the case law suggersts a framework for examining constitutional challenges to rules of evidence which prohibit an accused from presenting evidence:

> (1) The testimony must be relevant under Mil.R.Evid. 401 and 402 and vital to the defense when evaluated in the context of the entire record. If the evidence is either irrelevant or not vital to the defense, there is no constitutional right to present it.
>
> (2) The rule of evidence may not *arbitrarily* limit the accused's ability to present reliable evidence.
>
> (3) If the rule permits the admission of the evidence for some purpose, but not for others, it may not *arbitrarily* limit admission by the defense to a greater degree than by the prosecution.
>
> (4) The rule of evidence must not *arbitrarily* infringe on the right of the accused to testify on his own behalf.

[11] Applying these principles, we hold that the President's prohibition of the admission of polygraph evidence in Mil.R.Evid. 707(a) was a constitutionally permissible exercise of his Article 36(a), UCMJ, authority to prescribe modes of proof for trials by courts-martial.

[12] (1) The Court of Military Appeals has held that polygraph evidence may be relevant to the credibility of a witness. We will assume appellant's credibiility was relevant and vital to his defense. *See Rodriguez,* 37 M.J. at 452; *Gipson.* However, we do not believe presentation of polygraph evidence was vital to the court member's assessment of appellant's credibility.

[13–15] (2) Mil.R.Evid. 707 does not arbitrarily limit the accused's ability to present reliable evidence.

(a) A rule is arbitrary if it is "determined by chance, whim, or impulse, and not by necessity, reason, or principle." *The American Heritage Dictionary of the English Language* 94 (3d ed. 1992). The President's decision to prohibit polygraph evidence is not based on whim or impulse, but rather on sound reasoning. The Court of Military Appeals noted still valid concerns about the soundness of the underlying principles of the technqiue and the reliability of any particular polygraph evidence. *Gipson,* 24 M.J. at 248–49. That is why the Court assigned polygraph results to the middle class of scientific evidence. The President is rightly concerned that courts-martial could degenerate into a battle of polygraph examinations and experts that would impose a burden on the administration of military justice that would outweigh the probative value of the evidence. *See Helton,* 10 M.J. at 824 n. 15 (citing *United States v. Urquidez,* 356 F.Supp. 1363 (C.D.Cal.1973) (experience of District Judge in hearing 3 days of foundational evidence)).

(b) We are unwilling to follow the Army Court of Military Review's holding in *Williams.* The fact that military

judges are often called upon to resolve issues similar to some of the concerns expressed by the drafters of Mil.R.Evid. 707, or that the Department of Defense uses the polygraph as an investigative tool, does not bar the President from determining that the probative value of polygraph evidence is substantially out-weighed by other more compelling factors. The *Gipson* decision made sense in the absence of a rule prohibiting the admission of polygraph evidence. The Court of Military Appeals established the method for resolving the admission of all manner of scientific evidence, not just polygraph evidence—let the military judge hold an evidentiary hearing and render a decision. But, we believe the drafters' concerns for admitting polygraph evidence are significant enough for the President, exercising his Article 36(a), UCMJ, authority, to formulate a rule of evidence excluding it from courts-martial.

(c) "The first case to reject the admissibility of polygraph results was *Frye v. United States,* 293 F. 1013 (D.C.Cir.1923)." *Gipson,* 24 M.J. at 250. Over the years since *Frye,* the admissibility of polygraph evidence has been continually litigated in the federal courts, both on direct appeal and in *habeas corpus* actions. Nevertheless, we have been unable to locate any federal case, before or after the promulgation of the Federal Rules of Evidence, which suggests that the federal rule, or any similar state rule, unconstitutionally interferes with an accused's rights to due process or to present a defense.

(d) Furthermore, Mil.R.Evid. 707 applies a rule of evidence generally recognized by the federal courts. While not a part of the Federal Rules of Evidence, most of the federal circuit courts of appeal still hold that polygraph evidence cannot be introduced into evidence to establish the truth of statements made during the polygraph examination. *See United States v. Bounds,* 985 F.2d 188, 192 n. 2 (5th Cir.1993); *United States v. A & S Council Oil Co.,* 947 F.2d

1128 (4th Cir. 1991); *United States v. Lynn,* 856 F.2d 430 (1st Cir.1988); *United States v. Bowen,* 857 F.2d 1337 (9th Cir.1988); *United States v. Hall,* 805 F.2d 1410, 1416 (10th Cir.1986); *United States v. Cardarella,* 570 F.2d 264 (8th Cir.1978); *see also United States v. Rea,* 958 F.2d 1206, 1224 (2d Cir.1992) (Court had "intimated in past" that results not admissible, so trial judge did not abuse his discretion in ruling that polygraph was not sufficiently reliable to warrant admission); *United States v. Piccinonna,* 885 F.2d 1529 (11th Cir.1989) (trial judge has discretion to admit polygraph evidence when both parties stipulate in advance as to circumstances of the test and the scope of admissibility and, subject to three preliminary conditions, to impeach or corroborate the testimony of a witness at trial. The three conditions are: adequate notice to opposing party, opposing party given reasonable opportunity to have subject tested by own expert using substantially the same questions, and whether used to impeach or corroborate, admissibility is governed by the Federal Rules of Evidence, including Fed.R.Evid. 608. "Even where the above three conditions are met, admission of polygraph evidence for impeachment or corroboration purposes is left entirely to the discretion of the trial judge." 885 F.2d at 1536).

(e) While it might be arbitrary for the President to promulgate a rule which prohibits the admission of evidence which is assigned to the top scientific class, such as fingerprint evidence, we do not believe it is arbitrary to prohibit those techniques which fall into the middle or bottom classes, which by definition are less reliable. *See Gipson,* 24 M.J. at 249.

(3) The Mil.R.Evid. 707(a) prohibition on the admission of evidence is comprehensive and equally applicable to both the prosecution and the defense.

(4) Mil.R.Evid. 707(a) did not infringe on the right of the accused to testify on his own behalf.

[16] We believe Mil.R.Evid. 707 is a premissible rule "designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers,* 410 U.S. at 302, 93 S.Ct. at 1049. We, therefore, reject the Army Court's reasoning in *Williams* and hold that Mil.R.Evid. 707 did not unconstitutionally infringe on appellant's rights to due process and to present a defense. Accordingly, the military judge did not err in preventing appellant from laying a foundation for the admission of polygraph evidence.

II. County of Riverside v. McLaughlin Credit

On 13 May 1992, near Centerville, Iowa, an Iowa State Police officer apprehended appellant for speeding and driving on a suspended license. Appellant told the officer he was on leave from March Air Force Base. The officer called the squadron and discovered that appellant was absent without leave. The squadron first sergeant asked the officer to detain appellant until military personnel could escort him back to the base. On 15 May, a military escort, accompanied appellant back to March Air Force Base, where appellant's commander ordered him into pretrial confinement at 0030, 16 May. On 18 May, the commander completed a written memorandum, in accordance with R.C.M. 305(h)(2), concluding there was probable cause to believe appellant committed several named offenses under the UCMJ, and determining that continued pretrial confinement was necessary. On 20 May, the areas defense counsel asked for a delay until 28 May in the pretrial confinement hearing to be conducted by a military magistrate. On 28 May, the military magistrate conducted the hearing and ordered appellant's confinement continued.

[17, 18] A person arrested without a warrant must "be given a prompt judicial determinatin of probable cause as a prerequisite to pretrial detention." *United States v. Rexroat,* 38 M.J. 292, 294 (C.M.A.1993) (citing *Gerstein v. Pugh,* 420

U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975)), *cert, denied,* — U.S. —, 114 S.Ct. 1296, 127 L.Ed.2d 648 (1994). "[P]robable cause determinations made after 48 hours of arrest are presumptively untimely," and "the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance.'" *Rexroat,* 38 M.J. at 294 (quoting *County Riverside v. McLaughlin,* 500 U.S. 44, 57, 111 S.Ct. 1661, 1670, 114 L.Ed.2d 49 (1991)). "If military exigencies prevent completion of probable-cause review within 48 hours, the fact of these exigencies may be used to rebut the presumption." *Rexroat,* 38 M.J. at 295–96. If the commander's probable cause determination, made under either R.C.M. 305(d) or (h), is made within 48 hours, and the commander is neutral and detached, then *Gerstein* and *McLaughlin* are satisfied. *Rexroat,* 38 M.J. at 298.

[19, 20] We first must decide when the *McLaughlin* 48 hours started to run—upon appellant's apprehension in Iowa or some later time. The Court of Military Appeals has ruled that the 48 hours starts at the time the commander actually orders the service member into pretrial confinement, not the time he was taken into custody. *Rexroat,* 38 M.J. at 295. When the accused's official custody is not at the direction of military authority and the military makes rasonably diligent efforts to secure physical custody over him and order him into pretrial confinement, we believe it does not make sense to start the clock until the commander actually orders him into pretrial confinement. Thus, we consider the 48-hour clock to have started at 0030, 16 May 1992. Even if the clock started when military authority requested appellant be detained in Iowa, we believe the military exigencies of getting him back to March Air Force Base overcame the *McLaunghlin* presumption that the probable cause determination was untimely. *Rexroat,* 38 M.J. at 295–96.

[21] Next, we must determine if appellant's commander was "neutral and detached," such that either his initial confinement order or decision to continue confinement satisfies *Gerstein* and *McLaughlin*. Although the commander later preferred charges against appellant, there is no evidence of record to suggest he was "directly or particularly involved in the command's law enforcement function." *United States v. McLeod*, 39 M.J. 278 (C.M.A.1994) (quoting *United States v. Lynch*, 13 M.J. 394, 397 (C.M.A.1982)); *see United States v. Lopez*, 35 M.J. 35, 41 (C.M.A. 1992). Therefore, we hold the commander was neutral and detached.

[22] Finally, we must determine whether the commander had probable cause to place appellant into pretrial confinement. The prosecution did not present any evidence to show what information the commander had before him when he ordered appellant into pretrial confinement. Therefore, we are unable to conclude that, at the time he ordered appellant into pretrial confinement, the commander had probable cause to believe that appellant had committed an offense under the UCMJ, and that pretrial confinement was required by the circumstances. *See* R.C.M. 304(c); *Courtney v. Williams*, 1 M.J. 267 (C.M.A.1976). However, we find the commander's memorandum of his decision to retain appellant in confinement, dated 18 May, amply complies with *Gerstein* and R.C.M. 305(h)(2)(B). The prosecution failed to present evidence from which we could conclude that this memorandum, or the decision on which it was based, was accomplished within 48 hours (by 0030, 18 May). Although R.C.M. 305(k) does not specifically speak to the *McLaughlin* rule, we believe it is appropriate to apply its remedies to *McLaughlin* violations. Therefore, we hold that appellant is entitled to 1 extra day of pretrial confinement credit against his sentence. Since appellant has already served his confinement, we order the credit be converted to 1 day of total forfeitures. *See* R.C.M. 305(k).

III. Speedy Trial

Appellant insists that the military judge should have dismissed the charges' against him with prejudice because the prosecution failed to bring him to trial within 90 days of the initiation of his pretrial confinement. Appellant's attack is broad in scope. He claims that neither the special court martial convening authority nor the Article 32 investigating officer was authorized to grant delays for speedy trial accounting: the special court-martial convening authority because the case was referred to a general court-martial; the investigating officer because no convening authority had authorized him to grant delays. Normally, we review the military judge's rulings on speedy trial for an abuse of discretion and reasonableness. *United States v. Longhofer*, 29 M.J. 22, 28 (C.M.A.1989). Of course, we may find the facts overselves, if we so desire. Article 66(c), UCMJ, 10 U.S.C. § 866(c) (1994).

[23] "The accused shall be brought to trial within 120 days after the earlier of (1) Preferral of charges; (2) The imposition of restraint under R.C.M. 304(a)(2)–(4); or, (3) Entry on active duty under R.C.M. 204." R.C.M. 707(a); *see United States v. Kossman*, 38 M.J. 258 (C.M.A.1993) (overruling *United States v. Burton*, 21 U.S.C.M.A. 112, 44 C.M.R. 166, 1971 WL 12477 (1971) and *United States v. Driver*, 23 U.S.C.M.A. 243, 49 C.M.R. 376, 1974 WL 14085 (1974) presumption of speedy trial violation when pretrial confinement exceeds 90 days). "All periods of time covered by stays issued by appellate courts and all other pretrial delays approved by a military judge or the convening authority shall be excluded when determining whether the period in subsection (a) of this rule has run." R.C.M. 707(c). Regardless of the 120-day rule, the prosecution must take immediate steps to bring a confined accused to trial. Article 10, UCMJ, 10 U.S.C. § 810 (1988); *Kossman*, 38 M.J. at 262

("reasonable diligence" suggested as appropriate standard to evaluate Article 10 mandate).

[24] Appellant was initially apprehended on 13 May 1992 by the Iowa police for violation of Iowa law. However, since the record is unclear as to whether appellant remained in custody in Iowa becuse of the civilian charges or to await escorts to return him to military control, we consider his pretrial confinement, for speedy trial purposes, to have begun on 13 May 1992. *See United States v. Keaton,* 18 U.S.C.M.A. 500, 40 C.M.R. 212, 1969 WL 6045 (1969) (date of confinement for speedy trial purposes is date incarcerated for military offense). Appellant was arraigned 154 days later—14 October 1992. At the defense request, the military judge granted a 34–day delay from 10 September to 14 October 1992. Thus, appellant was brought to trial on the 120th day under R.C.M. 707. We need not reach appellant's assertions that neither the special court-martial convening authority nor the investigating officer had the authority to grant delays in this case. We conclude the prosecution was timely under R.C.M. 707 and was pursued with reasonable diligence under Article 10, UCMJ.

IV. Conclusion

The findings and sentence are correct in law and fact, and except for the *McLaughlin* credit for which appellant will be compensated 1 day of pay and allowances, no error prejudicial to the substantial rights of appellant occurred. Accordingly, the findings and sentence are

AFFIRMED.

Chief Judge DIXON, Senior Judges SNYDER, RAICHLE, and HEIMBURG, and Judges GAMBOA and BECKER concur.

Judge PEARSON, joined by Judge SCHREIER, (concurring in part and dissenting in part):

Speaking for the majority in *United States v. Gipson,* Judge Cox summarized his view on the reliability of polygraph evidence:

> In our assessment, the state of the polygraph technique is such that, depending on the competence of the examiner, the suitability of the examinee, the nature of the particular testing process employed, and such other factors as may arise, the results of a particular examination may be as good as or better than a good deal of expert and lay evidence that is routinely and uncritically received in criminal trials. Further, it is not clear that such evidence invariably will be so collateral, confusing, time-consuming, prejudicial, etc., as to require exclusion.

United States v. Gipson, 24 M.J. 246, 253 (C.M.A.1987).

If Judge Cox is right, and we think he is, this appellant was denied his constitutional right to lay the foundation for relevant, material, and favorable exculpatory evidence vital for his defense. *See, e g., Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (accused's right to present evidence); *Gipson,* 24 M.J. at 254 app. (listing of articles and treatises on reliability of polygraphs); *McMorris v. Israel,* 643 F.2d 458, 461–462 (7th Cir.1981) ("[W]e note that even the most ardent detractors from the validity of polygraph evidence concede a degree of reliability of 70% or higher for properly administered examinations.") *cert. denied,* 455 U.S. 967, 102 S.Ct. 1479, 71 L.Ed.2d 684 (1982). *See also Daubert v. Merrell Dow Pharmaceuticals, Inc.,* — U.S. —, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (standard for admitting expert testimony under Fed.R.Evid. 702); *United*

States v. Garcia, 40 M.J. 533 (A.F.C.M.R.1994) (standard for admitting expert testimony under Mil.R.Evid. 702); *United States v. Combs,* 35 M.J. 820 (A.F.C.M.R.1992) (same), *aff'd,* 39 M.J. 288 (C.M.A.1994).

Litigated urinalysis cases often present the classic man versus machine contest. There are no eye witnesses to the urinalysis based drug charge, nor any witnesses who testify the accused wa somehow impaired, nor any other corroborating evidence of durg use. Liekwise, there is no evidencer to show where or how the accused allegedly used the drug, or a precise time of use. Instead, machines—operated by humans—produce results—interpreted by humans—which the prosecution uses to procure a conviction. In this regard, the prosecutor calls an expert witness to explain that the machine results show the accused's urine specimen contained a metabolite of a chemical compound which is found in the drug charged. Consequently, the prosecution's case rests entirely on scientific evidence offered under Military Rule of Evidence 702.

Do urinalysis machines, or their operators, make "mistakes" which go undetected through normal quality control? We need only look at Pentium computer chips that can't divide, nuclear reactors that go haywire, and space shuttles that don't launch to answer that question.

So what if you are wrongfully accused of drug use based on an erroneous urinalysis result? You have no eyewitnesses to shake on cross-examination or to help you. You have no alibi witnesses unless you are in direct observation of someone for 24 hours a day, 7 days a week, since it only takes a moment alone to snort cocaine or consume most other drugs. Because of the nebulous nature of the prosecution's evidence, you basically have only your word. But, why should a judge or jury believe you, as opposed to the prosecution's "scientific" evidence, if you chose to testify? Credibility!

In a urinalysis case, the accused's credibility becomes the whole ball game if the accused denies use since urinalysis machiens can't be cross-examined. If the court convicts, it chooses not to believe the accused, the only real witness to the offense. Thus, evidence reflecting favorably on the credibility of the accused's denial is relevant, material, and vital to the defense in a urinalysis case where the accused takes the stand, which brings us to polygraphs.

Polygraphs are also machines—operated by humans—which produce results—interpreted by humans. Polygraph evidence reflets on the credibility of an accused's denial of having used the drug charged. *Gipson,* 24 M.J. at 253; *McMorris,* 643 F.2d at 461–2. Is it admissible on an accused's behalf—we think so in spite of the absolute prohibition in Military Rule of Evidence 707. *See United States v. Williams,* 39 M.J. 555 (A.C.M.R. 1994).

We agree the President may promulgate rules of evidence for trials by court-martial. However, the President may not promulgate a rule which infringes on an accused's constitutional right to present relevant, material, and favorable evidence. *See, e.g., Ellis v. Jacob,* 26 M.J. 90 (C.M.A.1988) (striking down President's rule in R.C.M. 916(k)(2) precluding accused from presenting evidence of partial mental responsibility to negate state of mind element of an offense); *United States v. Hollimon,* 16 M.J. 164 (C.M.A.1983) (recognizing constitutional limit on President's bar in Mil.R.Evid. 412(a) on admission of reputation or opinion evidence of nonconsensual sexual offense victim's past sexual behavior).

Consequently, we recognize a constitutional escape clause to Military Rule of Evidence 707, similar to that found expressly in Rule 412(b) which excludes evidence of a nonconsensual sexual offense victim's past sexual behavior. Polygraph evidence is not admissible unless it is

"constitutionally required to be admitted," that is, unless it is relevant, material, and favorable to the defense. *Cf. United States v. Williams,* 37 M.J. 352 (C.M.A.1993) (constitutionally required evidence under Mil.R.Evid. 412). In this regard, military judges should "view liberally the question of whether the expert's testimony may assist the trier of fact." *Combs,* 35 M.J. at 826. And, "[i]f anything, in marginal cases, due process might make the road a tad wider on the defense's side than on the Government's." *Gipson,* 24 M.J. at 252.

Here, the military judge did not afford appellant the opportunity to show his polygraph evidence met the constitutionally required criteria for admission. Consequently, we would return the record of trial to The Judge Advocate General for remand to the convening authority for a hearing on the admissibility of the proffered polygraph evidence in accordance with the procedures outlined in *United States v. Williams,* 39 M.J. at 559.